MISSISSIPPI LAW JOURNAL

A COMMENTARY ON THE JENCKS CASE AND ITS PROGENY
Hugh N. Clayton

IMPLIED COVENANT FOR ADDITIONAL DEVELOPMENT
James A. Boone

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William P. Murphy

December, 1959

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VOLUME XXXI DECEMBER, 1959 NUMBER 1

CONTENTS

LEADING ARTICLES

A Commentary on the Jencks Case and Its Progeny ..... *Hugh N. Clayton* 1

Implied Covenant for Additional Development ..... *James A. Boone* 34

State Sovereignty and the Founding Fathers—III ..... *William P. Murphy* 50

STUDENT COMMENTS

Bleistein — Before and After 84

RECENT DECISIONS

Constitutional Law — "Lady Chatterly's Lover"— Death to Motion Picture Censorship? 95

Income Taxation — Commuting Expenses from Taxpayer's Residence to His Place of Employment as Deductible from Gross Income 97

Oil and Gas — Effect of Unitization Upon Nonunitized Landowners 100

Oil and Gas Leases — Production During and After the Primary Term 104

Oil and Gas — Mineral Interest or Nonparticipating Royalty Interest 107

Torts — Landowner's Liability to Injured Trespassing Child — Attractive Nuisance Doctrine — Section 339 of the Restatement 109

Workmen's Compensation — Heart Attacks — Causal Connection and the Substantial Evidence Rule 113

RECENT BOOKS

The Supreme Court from Taft to Warren ..... *Wade J. Newhouse* 116

Cost Justification ..... *Earl T. Thomas* 120

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A COMMENTARY ON THE JENCKS CASE AND ITS PROGENY†

*Hugh N. Clayton**

INTRODUCTION

In the 29th section of the Magna Carta, a statement, somewhat freely translated, runs:

> "No free man shall be taken, or imprisoned, or dispossessed, or outlawed, or banished, or in any way destroyed, nor will we go upon him, except by the written judgment of his peers or the law of the land. To noone will we sell, to noone will we deny or delay justice or right."

To this fundamental principle of liberty and justice, the Bench and Bar of the English speaking world is dedicated. Difficulty, however, is found in the application of this fundamental principle. Rules of judicial procedure are created out of experience, out of trial and error, falling into a settled mode and such mode is the ways and means to the determination of the controversy. Advances with experience come with time and occasions, usually never with leaps, but gradually. When a code of rules is made, like the Federal Rules of Criminal Procedure, it is really a collation of old procedures and their modifications wrought through the light of reason and experience.

The Act of Congress of June 29, 1940 specifying that the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice and procedure with respect to any or all proceedings in criminal cases in the District Courts of the United States did not meet with unanimous approval of the membership of the Supreme Court. In the order of December 26, 1944 adopting the Criminal Rules, Mr. Justice Black entered his statement of disapproval and Mr. Justice Frankfurter entered his disapproval supported by a memorandum opinion. Such is indicative of the difficulty in the application of the principle of justice as it is comprehended under the common law.

†An address given at the Judicial Conference of the Fifth Circuit, at Houston, Texas on May 8, 1959.

*Attorney at Law, New Albany, Mississippi. President, Mississippi State Bar Association.

THE JENCKS CASE

On April 28, 1950, one Clinton E. Jencks, as President of a union, filed an "Affidavit of Non-Communist Union Officer" with the National Labor Relations Board in compliance with the National Labor Relations Act. He was indicted April 20, 1953 in the United States District Court for the Western Division, El Paso Division, under a two count charge of uttering a false sworn statement. During the course of his trial, two witnesses, Matusow and Ford, were offered by the Government who testified as to the alleged Communist party activities in which they and Jencks participated. These two witnesses testified that they made reports to the Federal Bureau of Investigation at intervals with varying frequency, that the reports were made following meetings and occasions when the events were fresh in their minds and that they could not recall which reports were oral and which were in writing.

Counsel for Jencks, after some extended cross-examination of Matusow, then made the following motion:

> "If the Court please, at this time we move you for an order requiring the prosecution to produce in Court the reports submitted to the F.B.I. by this witness concerning matters which he saw or heard at the San Cristobal Valley Ranch during the period that he was a guest there, during the period covered by his direct testimony. We ask that in doing this the following procedure be adopted: That the Court require that the reports be produced and handed to the Court for inspection. We desire those portions of the report which will contradict the witness' testimony. In view of the disparities in his testimony so far, I submit that there is a good ground for making this examination. We ask that those portions of the reports, which in the Court's view after reading them have an evidentiary value in this case for impeachment, be made available to us for cross-examination . . . . We are not seeking an opportunity to rummage in the Government's files. We are not concerned with the work product of Government counsel or any of their assistants. What we are concerned with is obtaining written declarations of this witness which are inconsistent with his testimony; and we assert to the Court, on the basis of the *Krulewitch* case[1] and other cases, that we have a right to obtain the witness' prior statements in order to show inconsistencies, if they exist; and a denial of this right to look at the statements would be in this case reversible error . . . . But if there is something contradictory in those reports, then we are entitled to use it as a part of the search for the truth, and in order to avoid the situation where we would be rummaging through Government files, we have pointed specifically to the reports we

[1]United States v. Krulewitch, 145 F.2d 76 (5th Cir. 1944).

have in mind and we ask that they be produced, not for us to look at, because that would be improper before the evidentiary value of the statements had been established, but we ask that they be produced for you to look at so you can determine whether or not they have evidentiary value. If they do not, then you don't turn them over to us. If they do, then you turn over that portion that has evidentiary value . . . ."[2]

The motion was overruled by the trial court. A similar motion was made with respect to the statements of the Government witness, Ford, which was based upon the same grounds and this motion was also overruled.

Jencks was convicted and appealed to the Circuit Court of Appeals for the Fifth Circuit. This Court affirmed the conviction by an opinion delivered on October 26, 1955,[3] and a rehearing was denied on December 1, 1955.

The Brief of Jencks in the Circuit Court of Appeals contained 28 specifications of error. Specification 12 alleged that the the trial court erred in denying Jencks' request for the production and inspection of the reports to the F.B.I. by witnesses Matusow and Ford. Arguing this specification under point 8 of his Brief, counsel for Jencks stated what he conceived to be the rule of procedure:

"It has long been established that statements by government witnesses, even when expressly given to a prosecutor in connection with his law-enforcement activities, are available to the defense when the person giving the statement or report is called as a witness. The report is available for any evidentiary purpose, but particularly impeachment. Whatever privilege attaches to the report by way of protecting the sources of information of law-enforcement officers or whatever governmental privilege may attach to the document as part of a government agency's file, the privilege and the policy supporting it fall when the possessor of the statement chooses to bring the transaction to light by initiating a prosecution and calling the witness. At that point any statements or reports given by the witness are competent for purposes of impeachment.[4] It appears from the Krulewitch opinion that the defense has the right to have the report or statement produced before establishing that the document contains impeachment material. Under those circumstances, the defense must ask that court to inspect the document to ascertain whether the impeachment material exists, and if it does the report

[2]Record, pp. 658, 659, 660, 662, Jencks v. United States, 226 F.2d 540 (5th Cir. 1955).

[3]Jencks v. United States, 226 F.2d 540 (5th Cir. 1955), *Rehearing denied*, 226 F.2d 553 (5th Cir. 1955).

[4]See Note 1 Supra.

is then turned over to the defense. The defense is not required to ask whether the report or statement contains conflicting statements in advance of getting the report itself. In the case at bar the defense followed this procedure."[5]

The syllabi of the *Jencks* case in the Court of Appeals opinion are seventeen in number with one syllabus devoted to the alleged error of the trial court in not examining the reports of the two Government witnesses in the possession of the Government and then presenting the relevant statements to Jencks for the purpose of impeachment. One paragraph of the opinion is devoted to this point and recites:[6]

"Appellant argues at length that he should have been permitted to explore the Government's file with the hope of turning up inconsistent statements by government witnesses Ford and Matusow. Upon a proper showing that the Government has possession of such inconsistent statements and the presence of the other requisite conditions, a person charged with crime would be permitted to examine and use them. But no such showing was made here, and the court below properly refused to require the Government to produce its file or any part of it for inspection. . . ."[7]

Certiorari was granted by the Supreme Court of the United States and its opinion, by a divided Court, was rendered on June 3, 1957.[8]

Mr. Justice Brennan delivered the majority opinion, expressing the views of five members of the Court, Mr. Justices Burton and Harlan concurred in a separate opinion, Mr. Justice Whittaker took no part in the consideration of the case and Mr. Justice Clark dissented. It is well to bear in mind that counsel for Jencks, in the trial court and in the Court of Appeals, maintained only that the Government files containing oral or written reports of the two Government witnesses should first be delivered to the trial judge to inspect for the purpose of ascertaining whether impeachment material existed and, if it did, such data was then to be delivered to the defense for impeachment purposes, if admissible. The majority opinion of the Supreme Court went beyond the position taken by counsel for Jencks and the decision of the Court of Appeals thereon, announcing in rather broad terms the rule with regard to such statements. Portions of the pronouncements of the majority opinion were made in the following language:

"The Government opposed petitioner's motions at the trial upon the sole ground that a preliminary foundation was not laid of inconsistency between the contents of the reports and the testimony of

[5]Opening Brief for Appellants, pp. 105, 106, Jencks v. United States, 226 F.2d 540 (5th Cir. 1955).

[6]Jencks v. United States, 226 F.2d at 252.

[7]Compare Shelton v. United States, 205 F.2d 806 (5th Cir. 1953); *cert. denied,* 346 U. S. 892 (1953).

[8]Jencks v. United States, 353 U. S. 657 (1957).

Matusow and Ford. The Court of Appeals rested the affirmance primarily upon that ground.

Both the trial court and the Court of Appeals erred. We hold that the petitioner was not required to lay a preliminary foundation of inconsistency, because a sufficient foundation was established by the testimony of Matusow and Ford that their reports were of the events and activities related in their testimony.

The reliance of the Court of Appeals upon Gordon v. United States,[9] is misplaced. It is true that one fact mentioned in this Court's opinion was that the witness admitted that the documents involved contradicted his testimony. However, to say that Gordon held a preliminary showing of inconsistency a prerequisite to an accused's right to the production for inspection of documents in the Government's possession, is to misinterpret the Court's opinion. The necessary essentials of a foundation, emphasized in that opinion, and present here, are that '[t]he demand was for production of . . . *specific documents and did not propose any broad or blind fishing expedition* among documents possessed by the Government on the chance that something impeaching might turn up. Nor was this a demand for statements taken from persons or informants not offered as witnesses.'[10] (Emphasis added.) We reaffirm and re-emphasize these essentials. 'For production purposes, it need only appear that the evidence is relevant, competent, and outside of any exclusionary rule . . . .'[11] Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness's testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the report of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness's trial testimony.

Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, as in Gordon, the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected. For the interest of the United

9344 U. S. 414.
10344 U. S. at 419.
11344 U. S. at 420.

States in a criminal prosecution '. . . is not that it shall win a case but that justice shall be done . . . .'[12]

This Court held in Goldman v. United States,[13] that the trial judge had discretion to deny inspection when the witness '. . . does not use his notes or memoranda [relating to his testimony] in court . . . .' We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written, and, when orally made, as recorded by the F.B.I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

The practice of producing government documents to the trial judge for his determination of relevancy and materiality without hearing the accused, is disapproved. Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e. g., evidentiary questions and inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial or irrelevant.[14]

In the courts below the Government did not assert that the reports were privileged against disclosure on grounds of national security, confidential character of the reports, public interest or otherwise. In its brief in this Court, however, the Government argues that, absent a showing of contradiction, '[t]he rule urged by petitioner . . . disregards the legitimate interest that each party—including the Government—has in safeguarding the privacy of its files, particularly where the documents in question were obtained in confidence. Production of such documents, even to a court, should not be compelled in the absence of a preliminary showing by the party making the request.' The petitioner's counsel, believing that Court of Appeals' decisions imposed such a qualification, restricted his motions to a request for production of the reports to the trial judge for the judge's inspection and determination whether and to what extent the reports should be made available to the

12Berger v. United States, 295 U. S. 78 (1935).
13316 U. S. 129 (1922).
14See Gordon v. United States, 344 U. S. at 418.

petitioner. It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Government's possession. This has been recognized in decisions of this Court in civil causes where the Court has considered the statutory authority conferred upon the departments of government to adopt regulations 'not inconsistent with law, for . . . use . . . of the records, papers . . . appertaining' to his department. The Attorney General has adopted regulations pursuant to this authority declaring all Justice Department records confidential and that no disclosure, including disclosure in response to subpoena, may be made without his permission.

But this Court has noticed, in United States v. Reynolds,[15] the holdings of the Court of Appeals for the Second Circuit that, in criminal causes '. . . the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense . . . .'[16]

We hold that the criminal action must be dismissed when the Government, on the ground of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial.[17] The burden is the Government's, not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets and other confidential information in the Government's possession."

In the special concurring opinion of Mr. Justice Burton, the broad language of the majority opinion is restricted in these words:

"I agree that, under such circumstances, it was unnecessary for petitioner to show that Ford's and Matusow's trial testimony was contradicted in some respect by their contemporaneous reports. Although some federal courts have required a showing of contradiction, this Court never has done so. A rule requiring a showing of contradiction in every case would not serve the ends of justice. I concur, therefore, in that portion of the Court's opinion holding

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15345 U. S. 1 (1953).
16345 U. S. at 12.
17Accord, Roviaro v. United States, 353 U. S. 53 (1957).

that petitioner laid a sufficient foundation for the production of the reports.

I would not, however, replace the inflexible and narrow rule adopted by the courts below with the broader, but equally rigid rule announced by the Court. In matters relating to the production of evidence or the scope of cross-examination, a 'large discretion must be allowed the trial judge.'[18] The appropriate determination of a motion to produce reports made in connection with the examination of a witness depends upon the significance of the facts sought to be established, and upon the potential use of the requested document in proving those facts. Since that determination depends on 'numerous and subtle considerations difficult to detect or appraise from a cold record . . .,' the trial court's discretion should be upheld in the absence of a 'clear showing of prejudicial abuse of discretion . . . .'

The Court goes beyond the request of petitioner that reports be produced for examination by the trial court and, in effect, seems to hold that the Government waives any privileges it may have with respect to documents in its possession by placing the author of those documents on the witness stand in a criminal prosecution. The Government's privileges with respect to state secrets and the identity of confidential informants embody important considerations of public policy. They are peculiar privileges in that they require the withholding of evidence not only from the jury, but also from the defendant . . . .[19]

The problem is closely related to that involved in Roviaro v. United States, supra, dealing with the necessity of the disclosure of an informer's identity in a criminal case. There this Court said: 'No fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.'[20] The trial judge exercises his discretion with knowledge of the issues involved in the case, the nature and importance of the Government's interest in maintaining secrecy, and the defendant's need for disclosure. By vesting this discretion in the trial judge, the conflicting interests are balanced, and a just decision is reached in

[18]Goldman v. United States, 316 U. S. 129 (1942); Glasser v. United States, 315 U. S. 60 (1942); Alford v. United States, 282 U. S. 687 (1931).

[19]353 U. S. at 675.

[20]353 U. S. at 62.

the indvidual case without needless sacrifice of important public interests . . . ."

Mr. Justice Clark dissented in rather strong language and portions of his dissenting opinion are as follows:

"The Court holds 'that the criminal action must be dismissed when the Government, on the grounds of privilege, elects not to comply with an order to produce, for the accused's inspection and for admission in evidence, relevant statements or reports in its possession of government witnesses touching the subject matter of their testimony at the trial.' This fashions a new rule of evidence which is foreign to our federal jurisprudence. The rule has always been to the contrary. It seems to me that proper judicial administration would require that the Court expressly overrule Goldman v. United States,[21] which is contra to the rule announced today. But that is not done. That case is left on the books to haunt lawyers and trial courts in their search for the proper rule. In Goldman the Court was unanimous on the issue of disclosure of documents and refused to order produced 'notes and memoranda made by the [federal] agents during the investigation.' The rule announced today has no support in any of our cases. Every federal judge and every lawyer of federal experience knows that it is not the present rule. Even the defense attorneys did not have the temerity to ask for such a sweeping decision. They only asked that the documents be delivered to the judge for his determination of whether the defendant should be permitted to examine them. This is the procedure followed in some of our circuits. My Brother Burton has clearly stated in his concurring opinion the manner in which this procedure works. Perhaps here with a recanting witness the trial judge should have examined the specific documents called for, as the defense requested, and if he thought justice required their delivery to the defense, order such delivery to be made. I would have no objection to this being done. But as BROTHER BURTON points out, this would not require a reversal but merely a vacation of the judgment and a remand to the trial court for that purpose.

Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets. This may well be a reasonable rule in state prosecutions where none of the problems of foreign relations, espionage, sabotage, subversive activities, counterfeiting, internal security,

[21] 316 U. S. 129 (1942).

national defense, and the like exist, but any person conversant with federal government activities and problems will quickly recognize that it opens up a veritable Pandora's box of troubles. And all in the name of justice. For over eight score years now our federal judicial administration has gotten along without it and today that administration enjoys the highest rank in the world. . . ."[22]

REACTION TO THE JENCKS DECISION

From a legal standpoint, apparently due to the broad language of the controlling opinion of the Supreme Court, defendants in criminal cases throughout the country sought all types and kinds of discovery and inspection of Government files, including pretrial disclosure. The decision of the Supreme Court was severely criticized by the public media of the country. This criticism was joined in by members of the Congress, representatives of the Executive Department, including the President, who observed:

"What they [the Justice Department] have opposed is the widespread opening of the F.B.I. files. In any one file in the F.B.I. records, fifteen people may be mentioned, some of them only once and in most derogatory fashion, because somebody that didn't like a man in a little village can say 'well he is a skunk,' or worse, and it will be down there in the report submitted by the individual. You could do incalculable damage, to my mind, just by opening up the F.B.I. files. It would be terrible."[23]

The Attorney General and the Department of Justice proposed "Remedial Legislation." The Attorney General released his written statement to the public which he gave before a sub-committee of the Committee on the Judiciary of the United States Senate on June 28, 1957. Portions of his statement read:

"S. 2377 to amend the procedures for production of statements and reports in federal criminal cases is intended to correct a grave emergency in law enforcement which has resulted from the decision of the Supreme Court in *Jencks v. United States* in the field of federal law enforcement. The issue in the *Jencks* case involved the procedure under which a defendant may inspect a statement of a government witness, in order to impeach the credibility of such witness. The argument of the case centered on whether it was necessary for the defendant to establish a foundation of inconsistency between the testimony of the witness and the statement before the statement was made available to the defense. The Court held that numerous lower court cases holding such a foundation was necessary

[22] 353 U. S. at 682.
[23] N. Y. Times, July 18, 1957, p. 12, cols. 3, 4.

were wrong, and that statements which relate to the testimony of the witness must be made available to the defense without requiring the defense first to establish some inconsistency. We accept this principle.

However, there is an immediate need for legislation to clarify the procedure to be followed in applying such a principle. Otherwise, serious harm will be done to federal law enforcement. Three principal problems have arisen.

The most serious problem which has arisen as the result of interpretations of the *Jencks* decision is the insistence by some courts that *entire* reports of the F.B.I. or other federal investigative agency be handed over to defense counsel, even though but a small part of the report relates to the testimony of a government witness. To understand the seriousness of such a ruling, let me briefly explain what such reports contain.

Reports of the F.B.I. are all inclusive and cover the full investigation of every phase of the case, frequently by F.B.I. officers in different parts of the country. They include not only interviews with possible witnesses, but information received from confidential sources, volunteered statements, and all the action that has been taken from the start of the investigation through the preparation of the case for trial.

The reading of an F.B.I. report by a defendant would often enable him to learn the identity of confidential informants. Frequently the information such informants furnish is of such a nature that its very disclosure will identify its source.

The uncovering of confidential informants, particularly in the internal security field, would cut off intelligence sources, and in some instances endanger the lives of the informants.

F.B.I. reports may contain information gathered by other intelligence investigative agencies, including those of friendly allied countries exchanging information on a cooperative basis under this Government's commitment that their identities will not be disclosed without prior consultation.

Investigative reports necessarily include the raw material of unverified complaints, allegations, and information which is checked out only if it bears upon the investigation. In some investigations it is necessary to secure the most intimate details of the personal life of a victim of a crime to aid in the identification of the wrongdoer. Thus in the early stages of any big extortion or kidnaping case, the enemies, both real and imaginary, of a family are frequently identified to the F.B.I. This personal information may subse-

quently prove to be wholly irrelevant in the ultimate outcome of the investigation. Nevertheless, it is in the reports, and properly so, because the F.B.I. investigation must record all information received, whether relevant or not and whether verified or not. The reports will also contain the names of suspects or unverified accusations against innocent persons. Disclosing the names of such persons might seriously damage the reputations of innocent persons.

Reports of other federal investigative agencies are prepared in the same way. In a criminal income tax or narcotics case the reports contain the complete story of the investigation. They include all the investigation, including much raw material which may have to do with leads to investigation of wholly unrelated crimes, or statements which, as I have indicated, could damage the reputation of innocent persons.

Study of one of these reports by defendants would necessarily make them familiar with the techniques of investigation, and could give them an instructive course in how to evade the federal law enforcement officers in the future.

It is obvious that because of the nature of these reports, the handing over of them to the defense would be completely unacceptable. The protection of law enforcement techniques, sources of intelligence, and protection of confidential informants is vital.

Yet it is these very reports that have become jeopardized as a result of interpretation of the *Jencks* decision by the courts.

In a narcotics case tried in Pittsburgh shortly after the *Jencks* decision, defense counsel sought the production and inspection of the entire Narcotics Bureau report after the Government agent had testified. The report covered all of the investigation of the case. The judge ordered the production of the entire report. When the United States Attorney declined to produce the entire report for inspection by the defense, the Court summarily dismissed the case. We have reason to believe that other judges in that District will follow this procedure in all future cases.

In an antitrust case, also tried in the Western District of Pennsylvania, the government was required to dispense with material testimony of F.B.I. agents because of the court's ruling that if the agents testified their entire reports would have to be given the defense.

In a narcotics case in Georgia, trial of which was actually in progress on the day of the decision, the defense attorney immediately asked for the production of 'any statements that the government witness was testifying from and any intelligence reports submitted to the government in the investigation carried on in con-

nection with this case.' The report by the investigator consisted of summarizations of the numerous interviews with police, drug company employees, and others. The investigator was on the stand and had testified that he had prepared the report. Two other witnesses, whose oral statements to the agent were paraphrased and summarized in his report, had already testified. The Court ordered that the government produce for inspection by the defense any of the reports relating to the events and activities about which either of the witnesses had testified or is expected to testify. The United States Attorney assured the Court there were no written statements by the witnesses but declined to produce the entire report or the summarizations of the oral statements of the witnesses to the agent which had not been read to or by the witness nor did they in any way adopt or approve these statements as correct. The agent had dictated his report after his interviews and, at best, his report was a summary of the interview—obviously hearsay evidence. The Court, without further discussion, dismissed the case.

In a criminal income tax case, likewise tried in Georgia, the court dismissed the case because the government declined to produce unauthenticated summaries of interviews with witnesses. At the time of dismissal the court indicated its opinion that a pending defense motion for production of the entire investigative report was well taken.

This interpretation of the *Jencks* case also threatens to upset convictions already obtained. A week ago today a defendant who had already been convicted in a criminal tax evasion in Rhode Island moved the court to order production and handing over to the defense of the complete reports of the Special Agent and the Revenue Agent who had investigated and prepared the case. Although the defendant had not requested these reports during the trial, the court immediately entered an order granting the motion. No final disposition of the case has yet been made.

Just last night we received notice that four defendants who were convicted of kidnapping on May 29th in Rhode Island have filed with the same court a motion to have turned over to them all reports of the F.B.I. relating to the 'alleged kidnapping' as well as any statements 'oral or written' made to the F.B.I. agents by the parents of the victim. That motion will be heard on July 8th.

In these two cases the direct result of one court's action under its interpretation of the *Jencks* case could be the freeing of a convicted tax evader and four convicted kidnapers.

In some instances since the *Jencks* case the courts have agreed to limit production of reports to the statements of the witness which

relate to the matters on which he has testified. Needless to say, counsel for defendants are urging the courts to go to the extreme of requiring all reports to be produced. In a mail fraud case in Texas, which had been in progress for weeks prior to the *Jencks* decision, the defense used the *Jencks* decision virtually to bring the trial to a standstill and inject a collateral issue of no import to the real issue of guilt or innocence. After some 60 witnesses had testified and while one of the government's key witnesses was testifying, the defense demanded and obtained the statements of that witness to the F.B.I. on an unrelated issue. They also demanded and obtained some 14 statements made by the witness to various government agencies over a period of several years. These included statements made to state agencies. Now the defense is demanding the statements of the some 60 witnesses who had previously testified and has indicated an intention to reopen their testimony. The principal witness was on the stand for nine days, eight of which were used for cross-examination based on the totally unrelated statements as well as the 14 apparently relevant statements. As a result, the vital issues have been thoroughly hidden in the mess of collateral issues raised as a result of the utilization of the *Jencks* decision for delay and confusion.

The second problem arises from the fact that in the *Jencks* case the Court ordered the government to produce reports orally made by the witness. This raises a grave problem and general language of the opinion must be given a reasonable interpretation to prevent serious unfairness. The Department takes the position that unless the witness has been in some way informed of the statements attributed to him, and has indicated his approval of their accuracy, that such reports should not be returned over to the defense. Such reports are mere hearsay as far as the witness is concerned and cannot and should not be used to attack the credibility of a witness. Obviously the credibility of a witness cannot be impeached by using a statement that the witness has never seen and never approved and which was prepared by someone else.

A third problem arises from an interpretation of the decision which would require pre-trial production of statements and reports.

In many cases, however, the defense has attempted to use the *Jencks* decision to rummage through government files prior to trial. In a case involving a charge of fraud against the government, prior to trial, the defense served a subpoena duces tecum on the F.B.I. requiring the production of 'all relevant statements and reports in [the government's] possession of government witnesses [written and when orally made, as recorded by the F.B.I.] at the forthcoming

trial of the . . . case.' After a hearing on the government's motion to quash, the judge wisely granted the motion and quashed the subpoena. In his opinion filed June 17, 1957, Judge Edmund L. Palmieri of the Southern District of New York pointed out that such a disclosure would force the government to furnish in advance a complete roster of its witnesses, a right reserved to capital cases, a burden which he said would cause the government both vexation and delay.

On the other hand, in the District of Puerto Rico, the court is considering, a motion for the pre-trial production and inspection of the complete investigative reports. In that district there are 16 criminal cases which will be affected by this ruling. To illustrate the character of other demands made by defense attorneys for pre-trial production influenced by the *Jencks* decision: In one case a motion requested the production of 'all reports' made by the F.B.I. agents which the government will use in the prosecution of the case. A pre-trial motion in an Alcohol Tax case sought the inspection of all documents including all reports, data, documents and papers in possession of the United States Attorneys pertaining to the case, and specifically demanded the transcripts of witnesses before the grand jury, the complete reports of the Alcohol and Tobacco Tax Division, including laboratory and investigative reports."

The Act, with amendments, was enacted by Congress and became effective September 2, 1957, exactly 90 days after the *Jencks* decision by the Supreme Court.[24] As finally adopted, the Act declares:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness [other than the defendant] to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement [as hereinafter defined] of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the winess, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to

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[24] 71 Stat. 595 (1957), 18 U.S.C. § 3500 (1957).

be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such times as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement' as used in subsections (b), (c), and (d), of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

THE NEW ACT AND HOW IT RELATES TO DISCOVERY UNDER THE FEDERAL RULES OF CRIMINAL PROCEDURE

There are three Federal rules applicable to discovery of documents in the Government's possession. Rule 15 (a) allows the defense to take the deposition of a prospective witness when it appears he will be un-

able to attend trial and any designated books, papers, documents or tangible objects, not privileged, may be required to be produced at the time and place of the deposition. Rule 16 provides for pretrial discovery of documents and papers belonging to the defendant or taken from third persons by seizure or process. Rule 17 (c) authorizes the Court to issue a subpoena duces tecum for evidentiary material before the Court at a time prior to trial or prior to the time when they are to be offered in evidence. The Act appears to have little practical effect on the defendant's rights defined by Rule 15 (a). The primary force of this rule is the actual allowance of a pretrial deposition—not affected by the new Act. Similarly, discovery under Rule 16 should not be restricted by the new Act. This rule is designed to allow the accused those books, public records and documents which he could have examined for prior Federal acquisition.

It would appear, however, that the new Act does limit the scope of Rule 17 (c). This rule, by its terms, provides the accused access to documentary information of evidentiary value, including statements and reports in advance of trial. Prior to the *Jencks* decision, this privilege was available principally in capital cases where the Government is required by statute to submit to the defense a complete list of all witnesses to be called at the trial.[25] The new Act provides, however, in Section (a) thereof, that no statement or report "in the possession of the United States which was made by a Government witness or a prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of a subpoena, discovery or inspection until said witness has testified on direct examination in the trial of the case."

OBSERVATIONS RELATIVE TO THE JENCKS DECISION

I

There is a serious question in the minds of many as to whether or not the Supreme Court was justified in establishing such a broad rule of discovery when the same was not necessary to decide the *Jencks* appeal. Discovery in criminal cases has never been as broad as is allowed under the Federal Rules of Civil Procedure. Judge Alexander Holtzoff has stated in his Introduction to West's 1957 Edition to the Federal Rules of Criminal Procedure the rationale to be:

> "Under the Federal Rules of Civil Procedure, utmost liberality of discovery was envisaged and prescribed. Liberal discovery was, however, deemed unsuitable in criminal cases. It cannot be had as against the defendant without encroaching on his rights under the

[25]Fryer v. United States, 207 F.2d 134 (D.C. Cir. 1953); 18 U.S.C. § 3432 (1948).

Fourth and Fifth Amendments. Likewise, it seemed unwise and inexpedient as a matter of policy to allow broad and unbridled discovery as against the Government. With this thought in mind, the Advisory Committee limited discovery in behalf of the defendant to such documents and objects as were obtained from, or which belonged to, the defendant, or which were obtained from others by seizure or by process upon a showing that the items were material to the preparation of the defense and that the request was reasonable. While the Rule is clear and unambiguous, some efforts have been made to confound it with a provision of Rule 17 (c), which permits a subpoena duces tecum to be made returnable prior to the trial, in order that in cases in which there is a great deal of documentary evidence, the trial may not be protracted by the production and inspection of documents while it is in progress. Attempts have been made to use the last mentioned provision as a means of discovery. The courts, however, have frowned on these endeavors and have indicated that, as was the intention of the draftsmen of the Rules, discovery and inspection may be had solely under the limitations of Rule 16 and that Rule 17 (c) may not be invoked for that purpose."

The only question before the Court of Appeals and before the Supreme Court in the *Jencks* case was whether or not the trial judge was correct in overruling the motion to have him inspect those reports in the possession of the Government and to determine whether or not they contained impeachment material. At the time the motion was made in the Trial Court, counsel for Jencks expressly stated, "We are not seeking an opportunity to rummage in the government's files."

However, the Supreme Court went the second mile and, in broad and general language, declared that the defendant had this right of rummage. It is axiomatic that an appellate court will consider only such questions as were raised and reserved in the lower court. In the case of *Indiviglio v. United States*,[26] the Court of Appeals of the Fifth Circuit, in a divided opinion, said:

" 'It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal or review. Under this rule a party will not be permitted, in the appellate or reviewing court, to assume a position inconsistent with that occupied by him in the trial court with respect to the grounds or theory of recovery or relief or of defense or opposition, the nature or sufficiency of pleadings, the admissibility or sufficiency of evidence, or the burden of proof.

The general rule that an appellate court will consider only

[26]249 F.2d 549 (5th Cir. 1957).

such questions as were raised in the lower court, and the rule requiring adherence to the theory pursued below, operate ordinarily to preclude the consideration, on appeal or review, of grounds of defense or of oppostion not asserted and relied on in the trial court. Under the general principle requiring definiteness and particularity in the statement of the grounds of objection, motions, and exceptions, where the ground upon which it is claimed that testimony should have been admitted were not stated at the trial, the propriety of its exclusion will not be considered on review . . . .' It is a rule of universial application by the Supreme Court, as well as the other courts of this country, that no opinion can be considered as binding authority unless the case calls for its expression. *American Jurisprudence* drew upon scores of Supreme Court decisions in its distillation of the rule to these words: 'The language and general expression in an opinion of the court are to be taken in connection with the case . . . and must be construed in the light of the issue which was in controversy in the case and which was decided . . . . They must not be extended beyond that for the purpose of authority in another and different case. In other words, to make an opinion a decision there must have been an application of the judicial mind to the precise question necessary to be determined in order to fix the rights of the parties.'

The rule was graphically epitomized by Mr. Justice Reed in the controlling opinion in Darr v. Burford:[27]

> 'We doubt the effectiveness of a voluntary statement on a point not in issue. Compare Bowen, L. J. in Cooke v. New River Co., 38 Ch. D. 56, 70-71: . . . like my Brothers who sit with me, I am extremely reluctant to decide anything except what is necessary for the special case, because I believe by long experience that judgment comes with far more weight and gravity when they come upon points which the Judges are bound to decide, and I believe that obiter dicta, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases.' "

Parenthetically, it may be observed that the well-reasoned opinion of the Court of Appeals in *Indiviglio* came to naught when the case reached the Supreme Court. It was reversed in a memorandum opinion under the authority of the *Jencks* case and on a confession of error by the Solicitor General.[28]

This tendency to go beyond the point in issue and to make volun-

[27]Darr v. Burford, 339 U. S. 200 (1950).
[28]Indiviglio v. United States, 357 U. S. 574 (1958).

tary statements as to what is the law has caused concern in many places. Just last year the Chief Justices of the State Supreme Courts, in language which showed no disrespect to the Supreme Court as an institution, said:

> "At times the Supreme Court manifests, or seems to manifest, an impatience with the slow workings of our federal system. That impatience may extend to an unwillingness to wait for Congress to make clear its intention to exercise the powers conferred upon it under the Constitution, or the extent to which it undertakes to exercise them, and it may extend to the slow processes of amending the Constitution which that instrument provides. The words of Elihu Root on the opposite side of the problem, asserted at a time when demands were current for recall of judges and judicial decisions, bear repeating: 'If the people of our country yield to impatience which would destroy the system that alone makes effective these great impersonal rules and preserves our constitutional government, rather than endure the temporary inconvenience of pursuing regulated methods of changing the law, we shall not be reforming. We shall not be making progress, but shall be exhibiting that lack of self-control which enables great bodies of men to abide the slow process of orderly government rather than to break down the barriers of order when they are struck by the impulse of the moment.' "

A national periodical polled the Judges of the United States Courts of Appeal and the United States District Courts as to whether or not they agreed with the conclusion of the State Chief Justices. One hundred twenty-eight of the Federal Judges replied. Forty-six per cent of those who replied expressed agreement, thirty-nine per cent disagreed and fifteen per cent preferred not to express any views. Recently Judge Learned Hand suggested that the Supreme Court had assumed the role of a superlegislature, a third chamber. It is submitted that the public reaction to the *Jencks* case and the Act of Congress of September 2, 1957 demonstrate the general feeling that the Court did not exercise proper judicial restraint in the *Jencks* case.

II

It is further observed that the *Jencks* decision went too far in removing the discretion and control of the trial judge. The special concurring opinion of Mr. Justice Burton emphasizes the practical necessity of leaving a large discretion in the trial judge. This basic rule, brought about in the light of reason and experience, is what gives validity to the acts of those persons participating as a part of the Court during the actual trial. The presumption with regard to the jury verdict and the

rulings of the trial judge, are all given weight because they see and observe and are present in the Court as the trial develops and unfolds. The decision of the trial judge in the exercise of his discretion should not be overturned on appeal unless there is clearly abuse. In a dissenting opinion recently,[29] Mr. Justice Harlan, joined by Justices Frankfurter and Burton, announced what appears to be the sound rule in this language:

> "The findings of the District Court as to what the procedural situation in this complicated case fairly required, made as they were by a judge who had been in charge of this case from the beginning, should not be disturbed by this Court any more lightly than findings made after a trial on the merits . . . ."[30]

Rule 52 (a) of the Federal Rules of Criminal Procedure states, "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The trial court should continue to have and exercise discretion and the writer concurs with Mr. Justice Harlan in the concluding paragraph of his dissenting opinion in *United States v. Procter & Gamble,*[31] wherein he states:

> "Here as elsewhere in the realm of discretionary power appellate review should be the safeguard against abuse in particular instances, rather than the a priori imposition of rigid restrictions upon trial judges which leave them powerless to act in appropriate cases."

It is believed that the Supreme Court should have confined its review to the narrow question as to whether or not the trial judge substantially abused his discretion in overruling Jencks' motion for discovery and inspection of Government files.

CONTRASTING LAW JOURNAL VIEWS OF THE JENCKS DECISION

The *Yale Law Journal,* in its February 1958 issue, contains a comment of some twenty-five pages under the title, "The Jencks Legislation, Problems in Prospect." The author is not given. The comment generally approves the *Jencks* decision and some relevant portions of the article recite:

> "Acting pursuant to its long-recognized judicial authority, the Supreme Court in Jencks v. United States enlarged a criminal defendant's right of access to government documents useful for cross-examination of prosecution witnesses. The documents allowed the

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[29]United States v. Proctor & Gamble Co., 356 U. S. 677 (1958).

[30]Cf. United States v. Yellow Cab Co., 338 U. S. 338 (1949); United States v. Oregon State Medical Soc., 343 U. S. 326 (1952).

[31]United States v. Proctor & Gamble Co., supra note 29.

defense were statements made to the Federal Bureau of Investigation, and the defendant was an alleged communist conspirator. General misinterpretation of the scope and content of the decision, in addition to the explosive circumstances of the case, led to stormy public reaction and harsh criticism of the Court. Spurred to immediate action by the intense public interest, Congress sought to enact legislation which would prevent Jencks from exceeding the reach of its narrow holding. Unfortunately, with recess fast approaching, haste was a prerequisite to legislation. As a result, the statute which finally emerged from the original, overly zealous limitation on discovery proposed by the Department of Justice contains ambiguities in some respects and, geared as it is to the fact situation presented by Jencks, appears to foreclose other discovery proceedings important to the defense and not contemplated by the Court. Whether viewed against the background of earlier judicial decisions or evaluated in light of the conflicting values in equitable adjudication and effective law enforcement, the Jencks opinion appears justifiable. Rarely has a court required that the accused establish a foundation of inconsistency prior to inspection of government documents. And the holding that the prosecution waives any privilege in relevant matter by initiation of suit conforms to a long-recognized series of decisions. In the only significant departure from previous practice, the Court removed the trial judge as initial exciser of inadmissible material and allowed defendant inspection of all statements related to the subject matter of direct examination. Even this holding is not unprecedented.

The Court's attitude is summarized in a paragraph of the decision:

> 'The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved. Relevancy and materiality *for the purposes of production and inspection,* with a view to use on cross-examination, are established when the reports are shown *to relate to the testimony of the witness.* Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g., *evidentiary* questions of *inconsistency,* materiality and relevancy—of the contents and the method to be employed for the elimination of parts *immaterial or irrelevant.*'

By expanding the test of inspection from admissibility in evidence to relevancy—logical relationship to testimony at trial—the Court permits the defendant to examine a broad group of documents previously denied him, documents relevant as logically related

to the witness's testimony but not meeting evidentiary standards of 'inconsistency, materiality and relevancy.' This enlargement is limited, however; irrelevant portions of partially relevant documents may not be viewed by the accused. In stating that 'elimination of parts immaterial or irrelevant' should be effected 'only after inspection of the reports by the accused,' the Court can be referring only to evidentiary determination of relevancy and materiality. Since the prosecution privilege is waived only to the extent that documents touch relevant testimony, no intent to prevent initial excision of independent portions by the prosecution can be imputed to the Court. A balance of the values in equitable adjudication and effective law enforcement also reinforces the Jencks solution. Information contained in inadmissible records may be just as important for impeachment purposes as that revealed by admissible documents. The fact that evidence is not sufficiently inconsistent with, or material or relevant to, the testimony of a prosecution witness to be admissible need not mean that it cannot arm the accused with knowledge essential to neutralization of the challenged testimony and, perhaps, a resulting successful defense. Moreover, the rationale for shielding insufficiently inconsistent records from the jury—facilitating the progress of the trial—seems wholly inapplicable to insulate such information from the defendant. Similarly, the government's primary security interest—concealing the identity of informants—does not appear jeopardized by allowing the defense access to inadmissible documents. This aim is effectively abrogated when the declarant takes the witness stand."

Somewhat opposite views appear in the Winter 1957-58 issue of the *South Texas Law Journal,* written by Newton B. Schwartz, former Assistant United States Attorney of the Southern District of Texas. Some portions of the concluding paragraphs of this article are:

"Insofar as Jencks held that it was no longer necessary for a defendant to establish the foundation of inconsistency between the testimony of the witness at the trial and that made in an out-of-court statement, before the statement would be made available to him, it represents a notable advance in Federal criminal discovery. Incorporation of this provision in the subsequent legislation was recommended by the Attorney General. However, no advance in discovery by one party is without consequent disability on the part of the other, which in criminal discovery is the Government, Federal or State. Therefore, it would seem that the limitations imposed upon the loose dictum in Jencks by the statute was wise. Pre-trial right of inspection of prospective witnesses' statements might create too great a temptation on the part of a person whose

liberty is at stake to 'cut his cloth' to the Government's case, to suborn perjury, and threaten, intimidate or bribe witnesses. Insofar as it would result in disclosing investigative techniques, informants, confidential sources and other leads furnished the Government, it would undoubtedly seriously hamper law-enforcement. For information received from its citizenry as to violations of the criminal law should be a most valued and protected media, even in those few instances where the informant is of the questionable reliability of a Matusow, a turncoat witness. To protect the long-recognized privilege of Government information, it is probably wiser to provide, as does the statute, that a federal district judge, rather than a defendant and his attorney, initially examine such statements where there is a question of their relevancy to the testimony on direct examination. That discretion is subject to the check of appellate courts which may examine the entire text of the excluded statements as part of the record.

Insofar as the majority in Jencks required a dismissal of a case where the Government refused to produce such requested statements, it was a harsh dictum with which to horse-collar enforcement of federal law. The statute's provision for striking of testimony and instructing juries to disregard, or if necessary, to declare mistrials are undoubtedly a better middle course. To strike such testimony still might directly result in dismissal of a case which would have been sufficient before Jencks. This was true in Jencks itself.

The legislation requiring in-trial production of statements and reports of witnesses is undoubtedly a step forward in the path of enlightenment in federal criminal proceedings. But so long as the defendant's treasured Constitutional rights under the Fourth and Fifth Amendments block the Government's way on such path, the destination of relatively free and unlimited discovery as in civil proceedings will never be reached."

PENDING APPEALS IN THE SUPREME COURT OF THE UNITED STATES INVOLVING THE JENCKS DECISION

There are five cases pending as of May 4, 1959 in the Supreme Court involving phases of the *Jencks* decision. This information is supplied by the Clerk of the Supreme Court who has graciously loaned the writer copies of the Briefs. The first appeal is a consolidation of three cases and the fifth is a consolidation of two cases. These appeals are numbered from 1 to 5 in this discussion, according to their number on the Supreme Court docket.

The first appeal concerns these cases: No. 435, styled *Lev v. United*

States; No. 436, styled *Wool v. United States;* and No. 437, styled *Rubin v. United States.* Each petitioner filed an individual brief but the Government filed a consolidated brief. The appeal is from a decision of the Court of Appeals for the Second Circuit. These three petitioners and six others were indicted for conspiracy to defraud the United States with respect to the administration and procurement of Government contracts. One Carlin, an accountant, testified as a Government witness. During cross-examination the trial court was asked to direct the Government to produce a statement which Carlin stated he believed he had signed and given to two Senate investigators. The trial court denied the request on the ground that no proper foundation showing inconsistency had been laid. The petitioners were convicted and sentenced on May 15, 1957. This was approximately three weeks before the *Jencks* decision. When these cases reached the Court of Appeals, the Assistant United States Attorney who had prosecuted the case filed his affidavit to the effect that at the time the demand was made for the signed statement of the Government witness, he had no such statement in his possession and had no knowledge of its existence; that following the *Jencks* decision, he sought the aid of the Senate Committee and the files revealed no statement but a copy of a memorandum of an interview with Carlin. One of the the Senate investigators also filed his affidavit. Petitioners urged upon the Court of Appeals the rule announced in the *Jencks* case. The Court of Appeals, after making an in camera examination of the affidavits, held the refusal of the Trial Court to permit inspection of a statement of this nature was error but harmless error, and it would not be available to the petitioners if they had a new trial under the provisions of the new Jencks statute. Some of the questions presented in this appeal were, (1) was it proper for the Court of Appeals to make an in camera examination of these documents in order to reach its conclusion, (2) were summaries and reports given by a government witness to a government investigator available under the new Jencks statute, (3) does the new Jencks statute provide the sole procedure by which such summaries and reports are to be made available to defendants, (4) whether the new Jencks statute is unconstitutional, and (5) whether the new Jencks statute is ex post facto legislation as applied to the petitioners.

The second appeal is No. 451, styled *Rosenberg v. United States,* and is from the Court of Appeals for the Third Circuit. Rosenberg was charged with transportation in interstate commerce of a certified check with knowledge of its fraudulent procurement. He was tried in the District Court in November, 1956, and convicted, but the conviction was reversed because the action of the trial judge was contrary to the subsequent *Jencks* decision. Prior to the second trial, Rosenberg filed motions

to examine statements and reports of principal government witnesses to the F.B.I., the testimony of such witnesses before the grand jury and for a continuance to make such inspection and examination. These motions were denied, were renewed and denied again. After the government witness had testified, motions were made for all the statements he gave the F.B.I., which motion was partially sustained. He was permitted to examine some statements and no reports from 11 A. M. until 2:15 P. M. Rosenberg, in his brief in the Supreme Court, presents these questions, (1) is the rule announced in *Jencks* one of procedure or does it involve the defendant's constitutional rights, (2) may a "clear violation" of the *Jencks* rule be harmless error, (3) may the "conceded error of the trial court" in withholding prior statements of government witnesses be excused because the Court of Appeals found it did not hamper the cross-examination of the defense, and (4) is it proper for a Court of Appeals to determine what use defense counsel might have made of the withheld statements. Rosenberg, in his brief, argues that the rule in the *Jencks* case is "substantive due process" under the Fifth Amendment and deals with a fundamental right.

The third appeal is No. 471, styled *Palermo v. United States.* Palermo was convicted of wilful attempt to evade and defeat Federal income taxes. His conviction was affirmed by the Court of Appeals for the Second Circuit. One of the Government witnesses was the senior partner of the accounting firm which had prepared Petitioner's income tax returns for upwards of 25 years. It developed on cross-examination that a special agent had interviewed the Government witness and had prepared a memorandum some hours after the conference which set forth what transpired between the auditor and the special agent. Defense counsel made a motion to inspect the portions of the special agent's memorandum which set forth what the auditor had told him, which motion was denied. Questions presented by Palermo include, (1) whether, if the new Jencks statute does not authorize inspection under the circumstances described above, the statute is exclusive so as to require the trial court to deny the motion to inspect, (2) whether, if the new Jencks statute is not exclusive, a motion to inspect made under the above circumstances should be granted under the authority of the *Jencks* decision, and (3) whether, if the new Jencks statute actually prohibits the granting of such a motion to inspect, such operates to deprive the petitioner due process of law guaranteed to him by the Fifth Amendment.

The fourth appeal, No. 488, is styled *Scales v. United States.* This case is from the Court of Appeals for the Fourth Circuit. Scales was found guilty of violating the Smith Act. The Supreme Court reversed a 1955 conviction on the authority of the *Jencks* decision. Scales was

tried again in February, 1958, convicted and the case returned to the Supreme Court. In his brief, Scales attacks the validity of the new Jencks statute by relying on the general language of the *Jencks* decision, alleging that the statute operates as a denial of due process of law, is arbitrary, capricious and unreasonable, and in his case is ex post facto legislation. On his second trial in February, 1958, the trial judge followed the procedure of the Jencks statute which limited Scales access to the statements of prosecution witnesses to agents of the Government.

The fifth appeal consolidates two petitions, No. 489, styled *Pittsburg Plate Glass Company v. United States,* and No. 491, styled *Galax Mirror Co., Inc., Mount Airy Mirror Co. and J. A. Messer, Sr., v. United States.* These two petitioners were indicted, with others, on a charge that they conspired to fix prices of plain plate glass mirrors, in violation of the Sherman Act. At the trial, the Government's case related to events of a single week in 1954 and the principal Government witness was one Jonas, the president of a large mirror manufacturer, who was not indicted. He testified at the trial and further stated that he had testified three times before the indicting grand jury. At the conclusion of his direct examination, motion to inspect his grand jury testimony was made by defense counsel, which motion was overruled. The question presented is (1) was it reversible error for the trial judge to deny the defendant, for use in cross-examination, inspection of the transcripts of the witness' testimony before the grand jury. It is the position of the Petitioners that, although grand jury testsimony is ordinarily confidential, it may be disclosed in connection with a judicial proceeding, relying on Rule 6 (e) of the Federal Rules of Criminal Procedure.

In summary, the position of the Government in its briefs in all these matters is a denial of the positions of the petitioners. The legislative history of the new Jencks statute is outlined in the Government briefs, which make cross-references, one to the other. It is maintained that many of these statements could properly have been denied under the *Jencks* decision itself, that if any error was made, it was harmless error and that the Congress has power to regulate procedure in the Federal Courts. One paragraph of the Government's brief in the Rosenberg appeal appears to summarize the general position of the Government in this language:

> "B. There is no doubt that Congress has power to regulate the procedure to be followed in the federal courts with respect to inspection, discovery, and production of documents in criminal cases. The statute is therefore valid unless violative of due process. But it cannot be said that this statute is contrary to concepts of fundamental fairness. Before its enactment, there was great

doubt that an accused had a right to pre-trial inspection of the statements of government witnesses. The question was not presented by the facts in Jencks, nor decided by the Court in its opinion in that case. The only circuit holding that such a right existed was the District of Columbia, where it was held, in a capital case, that the right existed. . . .[32] This Court recognized in Bowman Dairy Co. v. United States,[33] that the Rules of Criminal Procedure did not grant broad rights of discovery; Rule 16 limited discovery to evidence obtained from others by seizure or process. And the whole question of discovery in criminal cases is one on which authorities have disagreed. Congress had the right to make its choice between these conflicting views, especially since a statement given to a government agent is not evidence and is admissible at the trial only for the purpose of impeachment. It was entirely reasonable for the statute to permit inspection only after the person making the statement had testified, when it would be clear whether or not the statement touched upon the subject matter of his testimony."

According to information received by the writer from several sources, all of these cases were scheduled for argument before the Supreme Court during the week of April 27, 1959, and it is reasonable to assume that further decisions of the Supreme Court, interpreting the *Jencks* case, will be handed down before the Court adjourns for the summer of 1959.

PERSONAL OBSERVATIONS

It is assumed that some personal conclusions of the writer are indicated. It is felt that the language of the controlling opinion in the *Jencks* case went too far, was too general and was too broad. The special concurring opinion of Mr. Justice Burton preserves the discretion of the trial judge and permits the defendant to only have such portions of the statements from government witnesses as relate to impeachment. This, too, is the substance of the new Jencks statute which appears to be a proper solution of the problem.

As a general practitioner, the writer has had some experience in criminal cases, practically all for the defense. Since one's experience colors judgment and opinion, it is believed that the *Jencks* decision is sound when the statement is made that, "relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witnesses."

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[32]Fryer v. United States, 207 F.2d 134 (D.C. Cir. 1953), *cert. denied* 346 U. S. 885 (1953).

[33]341 U.S. 214 (1951).

The earlier decisions of the Courts of Appeal of some Circuits, including the Fifth Circuit, in the *Shelton* case,[34] requiring a proof of inconsistency as a condition precedent to the motion to inspect, it is submitted, was not sound nor justified by trial experience. There are no means available to the defendant generally to know and prove what is in Government files and, therefore, he cannot prove inconsistency. The new Jencks statute provides adequate safeguards to the Government, because the trial court examines any such statements in camera.

One of the ablest lawyers in Mississippi, having heard that the writer was to prepare this paper, expressed his views with regard to the underlying principle of criminal action, he wrote:

> "In a criminal prosecution before a court, the rules generally applying to adversary litigation should control. The government should not be given any favors, but it should not be penalized. In many fields the government is a favored litigant, which is entirely wrong. But, by and large, a ruling on discovery—which I think this is—or on evidence should be made by the court just as if two private litigants were engaged in a courtroom battle. There is no possible way the government can force a criminal defendant to give up anything in the way of a list of witnesses, statements, etc. The government should not, in my opinion, be subjected to any different rule. Certainly the government should not be forced to produce a witness' statement unless a dependable showing is made that the statement given to the government by the witness is at variance with what he says on the witness stand."

The writer must respectfully disagree that a criminal prosecution is a pure adversary action. The *Jencks* decision cites and quotes *Berger v. United States,*[35] wherein it is stated, "For the interest of the United States in a criminal prosecution . . . 'is not that it shall win a case but that justice shall be done.' "

The *Berger* case was decided April 15, 1935 by a unanimous court, the opinion was written by Mr. Justice Sutherland and the Chief Justice was the Honorable Charles Evans Hughes.

If this principle announced by *Berger* is sound, then a criminal prosecution is not a pure adversary action. This same view is held and announced by William W. Barron, the author of Volume 4 of *Federal Practice and Procedure,* by Barron and Holtzoff. In discussing Rule 16 of the Federal Rules of Criminal Procedure, the entire comment thereunder is in the following words:

"Rule 16 provides a very limited discovery for the benefit of de-

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[34]205 F.2d 806 (5th Cir. 1953).
[35]Supra note 11.

fendants where books, records or objects necessary to their defense are in the possession of the prosecution. The rule is not a radical departure from former practice except that it perhaps curbs any tendency on the part of government attorneys to deny to defendants access to documents which would have been available to the accused had they not been impounded by the government. The rule as it appeared in the preliminary drafts was much broader. It would have permitted the defendant to have discovery of books, papers, documents or tangible objects 'not privileged' upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. In this respect it reflected the purpose of the Federal Rules of Civil Procedure to eliminate the old elements of concealment and surprise. This was a manifestation of a growing sentiment to regard a criminal trial as an investgation of facts to ascertain truth rather than a contest of skill between lawyers or a spectacle for the entertainment of the countryside. Indeed a number of states require the prosecutor to furnish the defendant with a copy of the minutes of the grand jury. Yet so strong are habit and custom that many prosecutors still regard surprise as their special prerogative. They argue, and the courts uphold them, that the defendant is not entitled to know the government's case. This of course works no harm to the habitual or confirmed criminal. He already knows the government's case. The innocent defendant is the only one harmed by such an attitude. No sound reason has yet been advanced why the fullest discovery is permitted in civil actions involving only money and property, but denied in criminal actions involving liberty and life. Nevertheless the Committee in its final draft, struck out all reference to matter not privileged and restricted discovery in behalf of the defendant as heretofore indicated."[36]

One of the ablest leaders in judicial reform in this century was the late Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey. In the foreword of Barron's Volume 4 of *Federal Practice and Procedure* Judge Vanderbilt says:

"The Federal Rules have as their fundamental premise the elimination of tactical surprise and of technical advantage. They look on a lawsuit as an orderly search for the truth rather than as a sporting event depending on the craft of two legal gladiators."

It is submitted that truth and justice should be the end of all litigation. Our judicial system should be dedicated to the attainment of this goal.

"And ye shall know the truth and the truth shall make you free." (*The Holy Bible,* John 8:32.)

[36] 4 Barron & Holtzoff, Federal Practice and Procedure § 2031 (1951).

ADDENDUM

On June 22, 1959 the Supreme Court of the United States rendered decisions in three of the pending cases referred to in the preceding paper. These cases are *Palermo v. United States,*[37] *Rosenberg v. United States,*[38] and *Pittsburg Plate Glass Company v. United States.*[39]

In the *Palermo* decision, the majority opinion was written by Mr. Justice Frankfurter with a separate opinion being written by Mr. Justice Brennan, with the Chief Justice, Mr. Justice Black, and Mr. Justice Douglas concurring. Mr. Justice Brennan wrote the opinion in the *Jencks* case, decided on June 3, 1957.

The opinion in the *Palermo* case deals generally with the new Jencks statute.[40] The Court sought to justify the broad language of the original *Jencks* decision on the ground that the Congress had failed to prescribe procedures governing the production of documents. Pertinent quotations from the *Palermo* decision are:

> "Exercising our power, in the absence of statutory provision, no prescribe procedures for the administration of justice in the federal courts, this Court, on June 3, 1957, in Jencks v. United States . . . decided that the defense in a federal criminal prosecution was entitled, under certain circumstances, to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses."
>
> "It is clear that Congress was concerned that only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment."
>
> "We think it consistent with this legislative history, and with the generally restrictive terms of the statutory provision, to require that summaries of an oral statement which evidence substantial selection of material, or which were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent, not to be produced. Neither, of course, are statements which contain the agent's interpretations or impressions. In expounding this standard we do not wish to create the impression of a 'delusive exactness.' The possible permutations of fact and circumstance are myriad. Trial courts will be guided by the indicated standard, informed by fidelity to the congressional purposes we have outlined. There is nothing impalpable about these provisions. Since we feel the statutory standard has guiding definiteness, it would be idle to attempt a minute enumeration of particular situations to

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[37] 79 S. Ct. 1217 (1959).
[38] 79 S. Ct. 1231 (1959).
[39] 79 S. Ct. 1237 (1959).
[40] See note 24 supra.

which it is to be applied. Such a vain attempt at forecasting myriad diversities with minor variance is as futile and uncalled for in this as in so many other areas of the law. That is what the judicial process is for—to follow a generally clear direction in dealing with a new diversity as it may occasionally arise. Final decision as to production must rest, as it does so very often in procedural and evidentiary matters within the good sense and experience of the district judge guided by the standards we have outlined and subject to the appropriately limited review of appellate courts."

"This decision only concerned production and therefore did not purport to modify the laws of evidence governing the admissibility of prior statements of a witness."

"The Act was approved on September 2 and became law as Section 5300 of the Criminal Code, 18 U.S.C. Congress had determined to exercise its power to define the rules that should govern in this particular area in the trial of criminal cases instead of leaving the matter to the law-making of the courts."

"In almost every enactment there are gaps to be filled and ambiguities to be resolved by judicial construction. This statute is not free from them. Here, however, the detailed particularity with which Congress has spoken has narrowed the scope for needful judicial interpretation to an unusual degree. The statute clearly defines procedures and plainly indicates the circumstances for their application. Since this case is the first calling for authoritative expositon of an Act that frequently comes into use in federal criminal prosecutions we deem it appropriate to explicate the construction of the statute required by the circumstances of this case."

"The purpose of the Act, its fair reading and its overwhelming legislative history compel us to hold that statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. Section 3500 cannot be produced at all."

In the separate opinion supported by four members of the Court, the result of the appeal was approved but they objected to the general construction of the new Jencks statute, saying:

"I concur in the result but see no justification for the Court's ranging far afield of the necessities of the case in an opinion essaying obiter a general interpretation of the so-called 'Jencks Act.' Many more concrete cases must be adjudicated in the District Courts before we shall be familiar with all the problems created by the statute." The *Palermo* case was affirmed.

In the *Rosenberg* decision, Mr. Justice Frankfurter delivered the

opinion of the Court with the same four members, the Chief Justice, Mr. Justices Brennan, Black and Douglas dissenting. The majority opinion adopts and follows the majority opinion in the *Palermo* case, while the dissenting opinion finds reversible error committted by the trial judge.

The *Rosenberg* case was affirmed.

In the *Pittsburg Plate Glass Company* decision, the petitioners sought to inspect grand jury minutes covering testimony before that body of a key government witness at the trial. The majority opinion was delivered by Mr. Justice Clark and the same four members of the Court dissented. The majority opinion stated that the *Jencks* decision was not controlling in this instance nor did the new Jencks statute apply, the Court saying:

> "It appears to us clear that Jencks v. United States, supra, is in nowise controlling here. It had nothing to do with grand jury proceedings and its language was not intended to encompass grand jury minutes. Likewise, it is equally clear that Congress intended to exclude those minutes from the operation of the so-called Jencks Act. . . ."

The dissenting opinion is concerned primarily with the right of a defendant in a criminal case in Federal Court to see and inspect the testimony of a government witness before the grand jury which indicted the defendant. The dissenting opinion is not concerned primarily with the *Jencks* decision or the new Jencks statute.

The *Pittsburgh Plate Glass Company* case was affirmed.

In summary, the Supreme Court of the United States, in the *Palermo* case held the new Jencks statute to be a valid exercise of legislative power, that it prescribed the proper rules and criteria to be applied by the trial court "within the good sense and experience of the district judge guided by the standards we have outlined and subject to the appropriately limited review of appellate courts."

IMPLIED COVENANT FOR ADDITIONAL DEVELOPMENT†

*James A. Boone**

In 1956 the Honorable C. J. Meyers, Professor of Law at Columbia University, presented an article styled "The Implied Covenant of Further Exploration"[1] in which he made this statement:

> "It is the thesis of this paper that a new implied covenant should be recognized, the covenant to use due diligence to explore further. This covenant is different from the covenants to protect from drainage and to reasonably develop. The harm asserted by the lessor is different, and the standard of ordinary prudent exercise of the operating rights ought to be interpreted in the light of the harm. To insist that the standard means the same thing here as in the other implied drilling covenants is to abandon a general standard altogether and to substitute a rigid rule that no well need ever to be drilled unless that well will be profitable. This attitude defeats the lessor's claim before it is ever considered . . . .
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> When a landowner executes an oil and gas lease in usual form, he transfers to the lessee the exclusive right to operate on the land. But lease forms, which are long now and are getting longer, do not attempt to define how the operating rights are to be exercised. In most cases such an attempt would be futile, for even if the interests of lessor and lessee were identical, they could not foresee how the land should be explored and developed. It does not follow from this omission that the lessee is as free in the exercise of the operating rights as the lessor was before leasing. As every operator, and nowadays most landowners know, the courts have imposed on the lessee the duty of due diligence in operating on the land. The lessee is held to a hypothetical ordinary, prudent operator standard. . . .
>
> This standard of ordinary, prudent conduct has been used to settle innumerable disputes between lessors and lessees. Like other broad standards, it takes on meaning only when applied to specific disputes. Two types of disputes are so common that the broad duty has been particularized into the covenant to use due diligence to protect from drainage and the covenant to reasonably develop. . . .
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> The protection covenant, also called the offset well covenant, arose out of disputes about the need for an offset well. The harm

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†An address given to the Hinds County Oil and Gas Lawyers' Association on September 17, 1959.

*Staff Attorney, Gulf Oil Corporation, Jackson, Mississippi.

[1]34Texas L. Rev. 553 (1956).

to the lessor (and the lessee, too, unless he owns the adjoining lease) is the permanent loss of oil by drainage—oil that would produce royalty income if an offset well were drilled. That being the harm, is the lessee obligated to do anything about it? The answer is yes, if an ordinary, prudent operator would drill an offset well in the same circumstances. How is it known whether the hypothetical operator would drill? In effect, the judges have said, common sense tells us that a reasonable man would not lose his oil if he could save it at a profit. Thus the prudent operator standard means, when applied to the specific dispute, that where drainage is taking place, the operator must drill an offset well if he can do so and make a profit over and above the costs of drilling, equipping and operating the well . . . .

The same sort of analysis can be made of some of the disputes arising over development. As a matter of theoretical knowledge, we can identify at least three types of harm resulting from improper development of a known producing formation. Failure to drill at all may leave untapped oil that could be produced. Failure to drill enough wells or failure to drill in the right place may result in the permanent loss of otherwise recoverable oil. Less serious but still harmful, failure to drill enough wells may result in a slower rate of production, which deprives the lessor of the use of the capital represented by the unproduced royalty oil. These theoretical harms are not always actionable legal harms, just as allowing drainage is not always a violation of the protection covenant. The harms are actionable if an ordinary prudent operator would prevent them. Again, how do the judges determine what a hypothetical operator would do. By common sense, at least in part. A reasonable man will seek to produce all the oil that is recoverable and as fast as it can be recovered consistent with good conservation practice—if he can make a profit doing so. Thus, when the lessor has suffered one of these harms the courts have held that the reasonable development covenant requires the operator to drill those wells that will pay for themselves and pay a profit to boot.

There is a third type of dispute that involves neither the loss of petroleum nor the slowness of production. This type of dispute does not concern known mineral deposits at all. Rather it grows out of the lessee's failure to explore for mineral deposits. Consider this imaginary but hardly fanciful case. A rancher executed a lease on 640 acres of land in 1930. In 1932, oil production was obtained in the northeast quarter section. Four wells were drilled, the first three producers and the fourth, in the southwest quarter of the quarter section, a dry hole. No other wells were drilled. In 1956 produc-

tion totals sixty barrels daily from all three wells. But in 1955 another and deeper producing formation was discovered by a well located two miles to the southwest of the southern boundary of the lease. The rancher demands further exploratory drilling on his land. Should he get it?

In the offset well and the reasonable development covenants we have seen that the ordinary, prudent operator standard has been interpreted as requiring a well only if the well will be profitable. Put in other terms, recovery for breach of either of these two covenants depends upon proof that the well will produce enough oil to pay something over the costs of drilling, equipping and operating the well. If the prudent operator standard has the same meaning when applied to the third type of dispute, the rancher is not entitled to a well. But the three situations are not the same. A suit for breach of the offset or the reasonable development covenant is a suit for more drilling in a known producing formation. In an offset case the plaintiff seeks another well in a known producing formation because he suffers the harm of drainage. In a reasonable development case, the plaintiff seeks more wells in a known producing formation because he suffers from the harm of permanently unrecovered oil or from delayed recovery of the oil.

In the imaginary case the harm suffered by the rancher is the lack of further exploration on his land. The exclusive operating rights are in the lessee; if the lessee won't drill a test well, none will be drilled, for no one else can. Thus, in contrast to the offset and reasonable development covenants, what the lessor seeks is not another well in a known producing formation but another well to explore for new producing formations. The failure to explore may extend both laterally and vertically. The former occurs when the lessee holds a large tract of land, of which only a small portion has been explored and developed. The latter occurs when the lessee has fully developed a formation located at one depth but has failed to explore for deeper producing formations.

Whether or not the harm from failure to explore is an actionable harm depends, here as in other disputes between lessor and lessee, upon whether an ordinary prudent operator would drill an exploratory well in the same circumstances.

But the standard should not have the same meaning here as it has in offset and reasonable development cases. There the courts say, by common sense we know that a reasonable man w ill drill to remedy the harm if the well would be profitable. A reasonable man will not drill in a known producing horizon if the well would lose money. It does not follow that the same is true regarding

further exploration. Common sense and common observation tell us that oil operators are daily engaged in drilling wells in search of undiscovered mineral deposits. What a reasonable man may do about drilling wells in known producing formations has little bearing on what the same reasonable man would do about drilling wells to discover new deposits."

The prudent operator standard in itself came of age in the case of *Brewster v. Lanyon Zinc Co.*[2] Judge Van Devanter's opinion in that case is undoubtedly the most cited single authority in this field.

The rationale of the decision is summarized by the statement in the opinion that:

"The implication necessarily arising from these provisions (of the lease contract)—the intention which they obviously reflect—is that if, at the end of the five-year period for original exploration and development, oil and gas, one or both, had been found to exist in the demised premises in paying quantities, the work of exploration, development, and production should proceed with reasonable diligence for the common benefit of the parties, or the premises be surrendered to the lessor."

The Court refused to follow the "good faith rule" which made the lessee the final arbiter of all questions relating to development in the absence of fraud, holding that the covenant could be breached though the lessee was not guilty of fraud or bad faith.

Recognizing the problems of the operator, the Court stated the test which we now refer to as the "ordinary prudent operator test" in these words:

"The large expense incident to the work of exploration and development, and the fact that the lessee must bear the loss if the operations are not successful, require that he proceed with due regard for his own interests, as well as those of the lessor. No obligation rests on him to carry the operations beyond the point where they will be profitable to him, even if some benefit to the lessor will result from them. It is only to the end that oil and gas shall be extracted with benefit or profit to both that reasonable diligence is required. . . . Whatever, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required."

Another landmark case which we should note in our brief consideration of the development of the doctrine, is the *Sauder* case.[3] This was the first, and is the only, case in which the Supreme Court of the United

[2]140 Fed. 801 (8th Cir. 1905).
[3]Sauder v. Mid-Continent Petroleum Corporation, 292 U. S. 272 (1934).

States has considered the implied covenant for reasonable development. Justice Van Devanter, who wrote the opinion in the *Brewster* case, was a member of the court, and concurred in the controlling opinion. While it is apparent that the court felt that it was applying the rule enunciated in the *Brewster* case, its decision has been cited as possible support for the so-called "absolute standard" which requires the lessee to develop the lease or surrender it, that is, in spite of the fact that at the trial the defendant's experts testified that it was their opinion that an ordinary prudent operator would not drill an additional well although there was present in the area a deeper potentially oil-bearing formation, and the trial judge was unable to decide the question of the likelihood that any additional wells on the Sauder tract would produce oil or gas in paying quantities . . . nevertheless, the Supreme Court held the lessee guilty of breach of covenant and ordered the lease cancelled as to the untested portion on which there had been no exploration for a period of 17 years.

Following the *Sauder* case the litigants really went to work in Oklahoma. The Supreme Court of that state in 1943 rendered its decision in *Doss v. Texas Company.*[4] There have been a great number of cases and violent assaults thrown against the *Doss* case since that date, but its principle remains in force in Oklahoma. Stated succinctly, the suit was to cancel two leases as to undeveloped portions thereof—one lease covered 40 acres and was executd in 1917 and on which there were six producing wells before June 1922, but no drilling had occurred since that time. The other lease, executed in 1917, covered 100 acres and there were ten producing wells drilled in 1921 and 1922 and a dry hole was completed in 1923. No other drilling had taken place, except for the deepening of one well in 1924—the court said: "The principal question for decision is whether, in such a case, the lessor may have cancellation without the burden of proving that the lessee could have drilled additional wells with a reasonable expectation of profit." The Court found that the plaintiff had pleaded and proved facts entitling him to relief for breach of covenant. The Court said: "In this case 14 years was an unreasonable length of time for the lessee to hold the undeveloped portions of the leases without drilling in the absence of any showing of special circumstances justifying the non-development." What the court did was to shift the burden of proof to the defendant—merely by taking the position that a certain number of years was an unreasonable length of time. But, you can have a disagreement over what is an unreasonable length of time since the last drilling in any number of cases. The *Sauder* and the *Doss* cases seem to put great emphasis on the length of time that has elapsed since the last well was drilled on the leasehold. The rule in the *Doss* case had its closest call in 1950 in *Colpitt v. Tull,*[5] a five to four decision.

[4] 192 Okla. 359, 137 P.2d 934 (1943).
[5] 204 Okla. 289, 228 P.2d 1000 (1950).

The trial court decreed cancellation of a lease on an 80-acre tract except for 10 acres surrounding a producing well. Twenty years had elapsed without drilling since this well was completed. The Supreme Court affirmed the decree, holding that after the expiration of an unreasonable time and upon notice of breach and demand for further exploration, the lessor could recover without proof that additional wells would be profitable. Though the margin was narrow, the court clearly rejected the minority's call to overrule the *Doss* case and reinstate the rule requiring proof of profitable production. Since that date there have been a large number of cases coming out of Oklahoma, and the writer predicts many more if this rule continues. It is believed that the Oklahoma Supreme Court crystalized its position with regard to the question at hand best in *Texas Consolidated Oil v. Vann*,[6] decided in 1953.

> "The rationale of the cases leads us to the following conclusion: (1) Where in the Doss, McKenna and Colpitt cases the additional development is long delayed a court of equity may, in a proper case, declare that the implied covenants of the lease for reasonable development have been breached and upon such finding cancel the undeveloped portion thereof. The decree is sustained by proof of mere lapse of time without more. (2) Where from all facts and circumstances the delay in the additional development is not long delayed, but additional development is demanded by the lessor, the reasonable operator rule will apply. Neither the lessor nor lessee is the arbiter of its application. The rule of law which this and other courts have uniformly followed is that the lessor must establish the fact that additional development in all reasonable probability will result in profit to the lessee, over and above the costs of the development."

These "unreasonable periods of time" have ranged from 26 years, 20 years, 17 years, 14 years, 13 years, 12 years, 11 years, and 10 years, down to 3 years and 2 years. Conversely, where only a short time has elapsed since the last well was completed, the court has denied relief. In one case, the plaintiff demanded further exploration just four months after the completion of a dry hole on the land. Eighteen months had expired when the suit was tried. Neither of these periods was regarded by the court as unreasonable delay and relief was denied. Other cases, although recognizing a duty to explore further, have held that four years and sixteen years were not unreasonable delays in drilling under the circumstances. In an interesting recent case the length of time was measured from the date the defendant, as assignee of the lease, took its assignment. Fifteen months, during which the defendant had drilled one well, was regarded as not an unreasonable delay, although the last

[6] 208 Okla. 673, 258 P.2d 679 (1953).

well drilled before the assignment was fifteen years before the date of the trial. Another factor—rather a complex of facts—are the size of the tract, the number of wells on the tract, and the location of the wells. Again, these factors bear on both the degree of harm to the lessor and the reasonableness of the lessee's conduct. Also pertinent to this complex of factors is the depth of the wells, whether they were developed for exploration wells, and the cost of drilling and the anticipated return from them. Thus, in a number of cases, the density of the drilling is fairly high but cancellation is nevertheless decreed because the wells are at shallow depths and are development wells. In other words, the reasonable development of a shallow formation does not satisfy the duty to explore for deeper formations. It should be noticed, too, that this complex of factors is usually considered in relation to the length of time since the last drilling. While the exact weight given each of these factors can rarely be determined from the opinions, it is obvious what the judges have in mind; to what extent have the premises been explored? The size of the leasehold, the number of wells on it, the location of the wells and their depth, and the date the wells were drilled all bear on this question.

Louisiana has followed the prudent operator rule as announced in the *Brewster* case since the decision in *Caddo Oil & Mining Oil Co.*[7] There has been no indication that it intends to modify the rule, although cases such as *Humble Oil & Refining Co. v. Romero,*[8] which was a case in federal court, seem to suggest some willingness to make exceptions to meet unusual situations. However, it is not believed that in this case the lessee was damaged very much. The lease covered 876 acres on which three wells had been drilled at a cost of $5,000.00. One well produced and two were dry holes. Apparently about nine months had elapsed between the drilling of the last well and the demand for another well. The plaintiff relied on the testimony of two witnesses, a geologist who testified of probable production from another well, and an operator who testified he would drill the land if he could get a lease. The District Judge found that a preponderance of evidence did not show that another well would be profitable but held that the lease should be cancelled, except for 20 acres around the producing well, upon the offer of the operator-witness to drill. The decree allowed the lessee sixty days to drill or lose the lease. The Fifth Circuit Court of Appeals upheld the substance of the ruling, but modified the decree to make cancellation dependent on the witness-operator's furnishing "satisfactory assurances" that he would drill if the lease were cancelled. This rule seems to be that declared by the Supreme Court of Louisiana in the *Carter* case.[9]

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[7]134 La. 701, 64 So. 684 (1914).
[8]194 F.2d 383 (1952).
[9]Carter v. Arkansas Louisiana Gas Co., 213 La. 1028, 36 So.2d 26 (1948).

The decision does to some extent modify the notion that the plaintiff should have to make out a case that a well would produce profitably, based on the actual reservoir. But it can not be argued too strongly that if the operator is willing and able and puts up the satisfactory assurances of performance, he would cause the plaintiff to meet the test required—that is, that a prudent operator would drill. But, surely this should be the absolute minimum in meeting the burden of proof in these cases where the lessee manifestly has a property producing in paying quantities—regardless of the time element. In substance, the *Romero* doctrine has also been rejected generally by many other courts in the enumeration of the factors and circumstances that must be considered in determining whether further drilling should be conducted under this implied covenant. If these factors are to be given effect as prescribed by the courts, they eliminate the theory that the lessee is required to drill if the plaintiff can produce a witness who will testify that he would drill if he could obtain a lease.

Now, what about Texas? The law in Texas in a reasonable development case is that the plaintiff can not have a decree of cancellation when damages would suffice, which, of course, must be ascertainable, except in most extraordinary circumstances and then such a decree must be conditioned on the refusal of the lessee to perform the covenant as directed by the decree. In 1954 the Supreme Court of Texas in *Perkins v. Mitchell,*[10] which opinion certainly is not clear, appeared to have granted relief without discussion of the exploration duty. At least, that was the position taken by Professor Meyers. How anyone, including the professor, could get as much out of one page and a half as he did out of this decision escapes me. In a paper before the Ark-La-Tex Landmen's Association in Jackson in 1957 in regard to this problem the writer made this statement:

> "I am extremely doubtful that the Supreme Court of Texas contemplated or expected its opinion in *Perkins v. Mitchell* to have such a far-reaching effect, and I look forward shortly to clarification by that court of what its final holding will be, although I must admit that a Court of Civil Appeals, an intermediate appellate court in Texas, has cited both Mr. Meyers and *Perkins v. Mitchell,* as well as *Sauder, Doss, Humble v. Romero* and others, in expressly holding that there is an implied covenant of further exploration in Texas for the breach of which cancellation may be sustained."

The Court of Civil Appeals case referred to above is that of *Willingham v. Bryson.*[11] It was believed at that time this case would be appealed to the Supreme Court of Texas and that the Court would at least clarify the situation brought about by its decision in *Perkins v. Mitchell.*

[10] 158 Tex. 368, 268 S.W.2d 907 (1954).
[11] 294 S.W.2d 421 (Tex. Civ. App. 1956).

The writer then made this statement: "Thus, Mr. Meyers says that in *Perkins v. Mitchell,* Texas has joined the jurisdictions that enforce the further exploration covenant, though it has done so without mentioning the covenant or the use of state authorities. As with most cases adopting and applying a rule of law for the first time, the limits of the decision are not clear cut. Your speaker, with deference, has grave doubt that the court would presume to establish such a new and far-reaching rule without a complete analysis and discussion of the Texas law on the case and the concomitant need for such a rule, as well as the justice thereof. Evidence of the prospects for exploratory drilling rested, so far as the opinion discloses, on the testimony of one operator willing to drill an exploratory well—an operator who did not drill when he had the opportunity to do so under an assignment agreement."

But in *Willingham v. Bryson* the lower court did draw the conclusion that *Perkins v. Mitchell* had sustained the proposition and said: "As indicated above, under the holding in *Perkins v. Mitchell,* supra, we think it was not necessary for appellees to prove that additional drilling would probably result in profit. It is our view that this case involves the doctrine of implied covenant of further reasonable exploration; that there is such a covenant; and that the evidence is sufficient to sustain the court's finding that such covenant has been breached." Your writer then made this remark: "It is hoped that the Supreme Court of Texas will take a closer look this time than it appears to have done in *Perkins v. Mitchell* and will circumscribe this suggested covenant with rules and requirements which will prevent the lessor making a perpetual wildcatter or perpetual litigant of his lessee."

The Honorable Earl A. Brown, member of the Texas Bar and former General Counsel for Magnolia Petroleum Company, published his book on *The Law of Oil and Gas Leases* in August of 1958, and he has challenged Professor Meyers in his thesis that a "new implied covenant of further exploration should be recognized," and stated in his book:[12]

> "Professor Meyers has dreamed up a covenant which would require the lessee to drill a deeper well on his producing lease, regardless of whether there is any prospect that the said drilling would be profitable. Professor Meyers' hypothetical case is interesting mostly for what it omits rather than for what it recites."

Mr. Brown is referring to the hypothetical case which we have described earlier in this paper. Further from Mr. Brown's book:

> "The reason offered by Professor Meyers as to why his covenant 'to explore' should not be based upon the same factors as those which apply to the ordinary development covenant is the 'harm' to the lessor. He argues that there is more 'harm' to the lessor in not

[12]Brown, The Law of Oil and Gas Leases 336 (1958).

drilling such an exploratory well than there is in breaching the development and drainage covenants of the lease. More explicitly, the 'harm' in not conducting new exploratory operations is greater than the 'harm' in breaching the drainage covenant, for example, the reasoning is difficult to follow. If the drainage covenant is breached, a portion of the oil under lessor's property is permanently gone and lessor suffers the permanent loss of the value of the oil so drained. Yet, the covenant to 'explore' as proposed by Professor Meyers, does not contemplate that any of lessor's oil will be lost through production from a well two miles away. Still, he contends that the 'harm' to the lessor is greater in the latter situation than in the former. It appears that such reasoning is based on the assumption that if a well 'to explore' is not drilled immediately it will never be drilled. That doesn't follow at all."

Dr. Maurice H. Merrill, Research Professor of the University of Oklahoma, a most noted writer on implied covenants, got into the act in the summer of 1958 at the Fourth Annual Rocky Mountain Mineral Law Institute in the presentation of his paper, "The Implied Covenant for Further Exploration,"[13] in which he treated the matter of drilling to deeper sands, where there is a production on a lease from shallower sands, as a part of the same covenant that applies to further drilling in known sands. He calls it "the implied covenant to drill additional wells" and makes no distinction, as far as the standard of diligence is concerned, between the two operations. And his conclusion was: "Professor Meyers has made a challenging and stimulating suggestion for dealing with a most puzzling set of decisions . . . but, without overruling a lot of cases, and without making some pretty arbitrary decisions . . . I do not see how we can use his proposal in this field."

Professor Meyers came right back with his article in the December, 1958 issue of the *Texas Law Review*.[14]

"In 1956, I published in these pages an article entitled 'The Implied Covenant of Further Exploration.' In the intervening years the paper attracted considerable comment, as least for a law review article. In the natural course of events, some of the comment was favorable and some not; but most of it appeared at least to be a fair-minded appraisal of the merits of the proposals made in the article. Recently, however, a rather different kind of comment has appeared in a book published by an oil company attorney. Because of the tone of the discussion, the mistaken and erroneous statement of the cases, and the omission of all opposing authority, I feel compelled to refute the more serious errors in the attack, for I believe

[13]4 Rocky Mt. L. Inst. 205 (1958).

[14]Meyers, The Covenant of Further Exploration, A Comment, 37 Tex. L. Rev. 179 (1958).

that the covenant deserves careful and objective consideration.

The author selected two targets for his fire: one was the covenant of further exploration and the other was my article about it. The attack on the latter shall be ignored; the article can speak for itself; moreover, the important question is the duty itself and not what has been written about it. I should suppose that a good rule of law survives even the poorest discussion of it.

As to the covenant, the attorney seems to take these positions. First, the covenant is 'new' and hence has no place in the law because of stare decisis, which is discussed at considerable length and supported by extensive quotation from *Corpus Juris Secundum*. Second, the cases do not support the existence of the covenant. Both positions are untenable. . . ."

Mr. Brown didn't let the ink dry on that article. He fired right back in the February, 1959 issue of the *Texas Law Review*.[15]

"In the April, 1956 issue of the *Texas Law Review* there appeared an article entitled 'The Implied Covenant of Further Exploration,' by Professor C. J. Meyers, Associate Professor of Law, Columbia University. In this article, the author proposed a 'new' covenant to be implied in oil and gas leases. This writer took issue with Professor Meyers, both as to the justice of the new proposal and the applicability of the authorities cited in support thereof, in a recently published book. Professor Meyers in a second article makes a spirited attack upon the writer and the statements he has made, and in referring to them he uses such words as 'mistaken,' 'erroneous,' 'flatly wrong' and others of similar import. Because of the nature of this attack, the writer has felt impelled to seek this opportunity to reply to these statements.

In his 'Comment' the professor characterizes or 'stigmatizes' the writer as an 'oil company attorney.' No apology is offered for presenting the lessee's side of a controversial question, especially where the proposal, in the opinion of the 'oil company attorney,' would impose additional and unreasonable obligations upon a lessee in his operations under an oil and gas lease."

Mr. Brown in this article concludes:

"It is a well known fact that when a 'wildcat' well is successful, production proceeds outwardly and cautiously in an effort to determine the trend and extent of the producing formation. Whenever it appears that a reasonably prudent operator would be required to drill in order to protect the interest of the lessor, two miles away,

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[15]Brown, The Proposed Covenant of Further Exploration: Reply to Comment, 37 Tex. L. Rev. 179 (1959).

the existing implied covenants—the covenant against drainage and the covenant to drill additional wells—are ample to protect against any loss of royalty. On the other hand, to subject the lessee, by implied covenant, to the hazards and losses which would result from requiring him to drill wells of a 'wildcat' nature would certainly be unreasonable, and even disastrous. A drastic requirement of that character should never be the subject of implication; it should exist only by express provision in the lease."

Apparently the advocate was still not satisfied for he turned immediately to the *Southwestern Law Journal* of Southern Methodist University and the Southwestern Legal Foundation at Dallas, and in the spring of 1959, published his paper on "The Implied Covenant for Additional Development,"[16] and took up the discussion of the question of additional development in producing sands and deeper formations:

"Often there is more than one producing formation in a general area. Where there are deeper untested formations underlying a lease that is producing from an upper sand, is the lessee under an obligation to drill and develop the lower sands?

Of course, if there is production on an adjacent property near enough to drain oil from under the lease, the so-called drainage covenant would apply. This covenant, after called 'the implied covenant to protect the leased premises against drainage,' would require the lessee to drill a 'protection' well or wells, provided (1) there is no express covenant defining the duty of the lessee in such cases, and (2) it is shown that such a well would be sufficiently productive to pay the lessee a profit over and above operating costs.

Ordinarily, the drainage covenant is sufficient to protect both the lessor and lessee and to provide the 'reasonable diligence' necessary therefor. However, there have been cases where the lessor has demanded drilling to the lower sands where the wells on other lands are located at such distances as to make the drainage covenant inoperative. In many of the cases where this issue has been raised, the lessor has demanded further development both in the formation from which production is being obtained and the deeper unexplored formation. The courts have applied the 'prudent operator' test to both situations. Of course, the degree of proof will vary in each case. What would be sufficient evidence to require a lessee to develop further a formation already producing on his lease would ordinarily not be enough to require him to drill deeper where the deeper production was some distance from his lease. But the prin-

[16]Meyers, The Implied Covenant for Additional Development, 13 Southwestern L. J. 149 (1959).

ciple is the same; whatever in the circumstnces would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee, is what is required.

Many cases have applied the prudent operator test to the lessee's obligation to drill to deeper sands which might exist beneath producing sands. In each case the rule has been announced that such an obligation depends upon whether there is a reasonable expectancy of profit in such operations. These cases hold also that the 'hazards and costs' of that character of development should be considered in determining whether the duty to drill exists in any particular case.

Several noted writers have analyzed the cases and expressed their opinions on the obligation of the lessee to drill deeper and untested formations on a producing lease. Professor Maurice Merrill says: 'There is an obligation to attempt to develop production from lower strata where the data available gives reasonable ground for believing that they may contain profitable deposits: Expressing it in different words he refers to the 'obligation to exploit deeper sands if reasonable ground for expecting profitable production exists.'[17]

Professor A. W. Walker also discusses the 'deeper drilling' obligation, saying: 'It would seem that this implied duty would not exist unless there were wells in the vicinity producing in paying quantities from the lower stratum and unless the known geological formations were such as would lead a reasonably prudent operator to believe that the possibility that this lower production horizon underlay the leased premises justified the drilling of a test well.'[18] Professor Wilmer D. Masterson, Jr., in discussing the covenant to drill additional wells after production says: 'It seems that in no case has this obligation been restricted to drilling to the stratum to which the prior well or wells were drilled. . . . The correct test, it is believed, is not what public policy dictates, but what the provisions of the lease are and what covenants can be reasonable implied therefrom. Usually this would result in application of the reasonable and prudent operator test.'[19]

Professor C. J. Meyers, however, has proposed a new covenant to apply to deeper drilling on a lease already producing. He would require a lessee to 'explore' deeper formations if production from deeper sands is discovered in the general area of the leased premises. His illustrative case was that of a rancher whose lessee has drilled three producing wells on the leased premises and later a deeper pro-

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[17]Merrill, Covenants Implied in Oil and Gas Leases 174 (Ind. Ed. 1940).

[18]Walker, The Nature of the Property Interests Created by an Oil and Gas Lease in Texas, 11 Tex. L. Rev. 399 (1933).

[19]Discussion Note, 6 Oil & Gas Rep. 1099 (1956).

ducing sand is discovered two miles from the lease. Under this latter view, such covenant would impose upon the lessee, where the rancher demanded it, the obligation to 'explore' the deeper formation on the rancher's land without considering the prudent operator rule and whether there is any reasonable expectation of profit from such drilling or not.[20]

This writer has taken issue with Professor Meyers, both as to the 'reasonableness' of his proposed covenant, and also as to the applicablity of the authorities cited in support of it. These differences are revealed in a recent book[21] and in subsequent law review articles.[22] It is this writer's position that the proposed new covenant is unnecessary, that the 'prudent operator' test fully protects the lessor in such case; and that there is no difference in princple in applying this test to development of known producing sands and to deeper sands to which no wells have been drilled on a particular lease."

We are happy at least to be able to report that the Supreme Court of Texas has at last expressly ruled in regard to the matters which we have discussed. In the case of *Clifton v. Koontz,* decided June 24, 1959,[23] the Supreme Court of Texas expressly disapproved *Willingham v. Bryson* and Professor Meyers and declined to follow the theory advanced by him that there is an implied covenant to explore as distinguished from an implied covenant to develop, in these words:

"We now turn to the holding of the trial court that the working-interest owners impliedly covenanted to further explore the land for other reservoirs and formations, and that such implied covenant was violated, and that such violations obligated the respondents to drill a second or additional well. Petitioners contend that there is an implied covenant to explore as distinguished from the implied covenant to conduct additional development after production is once obtained. Petitioners argue that there is a distinction between development and exploration. They urge this court to approve of the holding in the case of *Willingham v. Bryson,* wherein an implied covenant of exploration is opposed to the implied covenant of development was adopted. We do not believe this case to be authoritative or in harmony with the rule announced in the Texas cases. Our examination of the Texas cases reveals that the corpus of the oil and gas law, as it has developed, treats the

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20Meyers, The Implied Covenant of Further Exploration, 34 Tex. L. Rev. 553 (1956).

21Brown, The Law of Oil and Gas Lease (1958).

22Brown, The Proposed New Covenant of Further Exploration: Reply to Comment, 37 Tex. L. Rev. 179 (1959); Meyers, The Covenant of Further Exploration: A Comment, 37 Tex. L. Rev. 179 (1958).

23325 S.W.2d 684 (Tex. 1959).

covenant of development as covering all additional drilling requirements after production is once obtained on the lease, except those for production from offset wells which are draining the premises.

The issue in *Willingham v. Bryson,* supra, was whether there is an implied covenant to 'explore' as distinguished from the covenant to 'develop,' and if there be such a covenant, what is the lessor's burden to show that he is entitled to further exploration or to a cancellation. The court held that there is an 'implied covenant reasonably to explore a lease after production has been obtained' as distinguished from the covenant reasonably to develop. The court continues by stating that it is not necessary for the lessor to prove that additional drilling would probably result in profit, but that the prudent operator rule was satisfied by a showing that no well had been drilled to a deeper sand, 'coupled with the testimony of one witness that he would be willing to drill another well.'

The Court of Civil Appeals in the *Willingham* case, supra, cites the case of *Sauder v. Mid-Continent Petroleum Corporation* in support of its theory of the existence of a covenant to explore. However, the court in the *Willingham* case makes no reference to the clearly stated issue in the *Sauder* case. 'The question for decision is whether the respondent failed to comply with an implied covenant to develop the tract with reasonable diligence.' The court did not treat exploration as a separate covenant, but instead followed the basic theory in the case of *Brewster v. Lanyon,* supra. The latter case dealt solely with the development covenant. In addition, the court in the *Sauder case,* justifies its holding upon the peculiar circumstances surrounding the drilling on the disputed lease where drilling has been so long delayed.

We hold that there is no implied covenant to explore as distinguished from the implied covenant to conduct additional development after production in paying quantities has been obtained. Petitioners argue that the lease involved expressly provides for exploration. We agree that, under the terms of the lease, the lessee has the right to explore, but it does not necessarily follow that the lessee is under a duty to explore. To follow petitioners' argument would be to adopt the theory advanced in their 'Outline of Argument,' filed in this court that 'In an oil and gas lease, the implied covenant reasonably to explore obligates the lessee to drill when a ready, able and willing operator would drill regardless of the certainty of profit.' In support of this theory the petitioners cite the case of *Willingham v. Bryson,* supra and *Meyers.*[24] This theory is untenable and is diametrically opposed to our established 'prudent

[24]See note 20 supra.

operator' rule where expectation of profit is an essential element. We decline to follow the theory advanced that there is an implied covenant to develop. There being no implied covenant to explore, the respondents were under no duty to drill a second or additional well, as found by the trial court."

It appears that for the moment the advocate has prevailed over the professor.

CONCLUSION

The standard of reasonableness is applied both to the lessor's demands and the lessee's duty in the many decisions involving implied covenants of development or additional drilling. The "reasonableness" depends obviously upon the facts and circumstances of each case and many factors have been examined, such as the amount of money already expended by the lessee; the expectation of ultimate profit; the probable quantity of hydrocarbons which may be ultimately produced as indicated by prior development; the character of the sub-surface structure and sands in the area; facts derived from geological and geophysical operations in the area; the extent and result of operations on adjacent lands; improved methods of operation and development; market conditions and transportation facilities; the cost of drilling and operating wells; the nature of the producing formation, and its thickness, saturation and general character; as well as restrictions upon production under lawful authority of state or federal agencies. All of these factors, as well as others peculiar to the particular case before the court, having a bearing on what is "reasonable diligence" and what is a reasonable delay in development, both of known and untested formations. The court, in the exercise of its equitable powers, must apply the rule and base its decision upon whatever in the circumstances would be reasonably expected of operators of ordinary prudence, having regard to the interests of both lessor and lessee.

STATE SOVEREIGNTY AND THE FOUNDING FATHERS—III†

*William P. Murphy**

THE SOUTH CAROLINA DELEGATES

1. *John Rutledge.* A Charlestown lawyer who had studied in England, Rutledge, like most conservatives, had preferred self-government within the empire to independence, but supported it when it came. He was a member of both the First and Second Continental Congresses, was governor from 1779 to 1781, and returned to Congress in 1782.

In the Convention Rutledge took a cautious approach toward national supremacy. Thus, on June 5 "He was against establishing any national tribunal except a single supreme one. The state tribunals are most proper to decide in all cases in the first instance . . . .[191] Mr. Rutledge, having obtained a rule for reconsideration of the clause for establishing inferior tribunals under the national authority, now moved that that part of the clause should be expunged; arguing that the state tribunal might and ought to be left in all cases to decide in the first instance, the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments; that it was making an unnecessary encroachment on the jurisdiction of the states, and creating unnecessary obstacles to their adoption of the new system."[192]

On August 23, however, he moved the adoption of a supremacy clause almost identical with the one eventually adopted, requiring state judges to be bound by the Constitution, laws and treaties of the United States in cases of conflict with state constitutions and laws. Furthermore he contemplated clearly that the Supreme Court would decide controversies between the states and also between the nation and the states. Thus, on August 24, "Mr. Rutledge said this provision (for deciding controversies between the States) was necessary under the Confederation, but will be rendered unnecessary by the National Judiciary now to be established, and moved to strike it out."[193] And on August 27, opposing a motion to make Supreme Court judges removable by the President on recommendation of Congress, Rutledge said: "If the Supreme Court is to judge between the U. S. and particular States, this alone is an insuperable objection to the motion."[194]

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†That is the third and final installment of an article which began in 30 Miss. L. .J. 135, and was continued in 30 Miss. L. J. 261 (1959).

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191 Records 119.

192 Records 124.

193 Records 400.

194 Records 428.

Rutledge believed that Congress' powers should be enumerated. On the proposition to grant legislative power in all cases to which the state legislatures were individually incompetent, on May 31 he "objected to the vagueness of the term *incompetent,* and said they could not well decide how to vote until they should see an exact enumeration of the powers comprehended by this definition."[195] And on July 16 "Mr. Rutledge urged the objection started by Mr. Butler and moved that the clause, should be committed to the end that a specification of the powers comprised in the general terms, might be reported."[196] He was also against the Congressional negative. Thus, on August 23 Mr. Rutledge said: "If nothing else, this alone would damn and ought to damn the Constitution. Will any State ever agree to be bound hand and foot in this manner. It is worse than making mere corporations of them whose bye laws would not be subject to this shackle."[197]

With respect to the clause concerning the states' power to determine the time, place and manner of holding elections for Congress, on August 9 "Mr. Pinckney and Mr. Rutledge moved to strike out the remaining part, viz, 'but their provisions concerning them may at any time be altered by the Legislature of the United States.' The states, they contended, could and must be relied on in such cases."[198] However, as to a motion to guarantee the states against foreign and domestic violence, on July 18 "Mr. Rutledge thought it unnecessary to insert any guarantee. No doubt could be entertained but that Congress had the authority, if they had the means, to co-operate with any state in subduing a rebellion. It was and would be involved in the nature of the thing."[199] Rutledge also believed that property should be part of the basis of representation, that Congress should be elected by the state legislatures, and that the President should be elcted by Congress. He was against restrictions on the slave trade, but thought the natonal goverinment should assume state war debts.

Rutledge subsequently was appointed, but did not sit, as an associate justice of the Supreme Court, and served briefly under an unconfirmed recess appointment, as Chief Justice. He died insane.

2. *Charles Cotesworth Pinckney.* Another prominent Charlestown lawyer, Pinckney had been educated in England and had studied law under Blackstone. Returning to America in 1769, he became active in colonial politics and government and was a typical representative of the conservative propertied class. During the revolution he rose to the rank of brigadier general, and was (and is) referred to as "General Pinckney" to distinguish him from his younger cousin.

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195 Records 53.
196 Records 17.
197 Records 391.
198 Records 240.
199 Records 48.

In the Convention, Pinckney set forth his views generally on nation-state relations on June 6. "General Pinckney wished to have a good national government and at the same time to leave a considerable share of power in the states. An election of either branch by the people scattered as they are in many states, particularly in South Carolina, was totally impracticable. He differed from gentlemen who thought that a choice by the people would be a better guard against bad measures, than by the legislatures. A majority of the people in South Carolina were notoriously for paper money as a legal tender; the legislature had refused to make it a legal tender. The reason was that the latter had some sense of character and were restrained by that consideration. The state legislatures also, he said would be more jealous and more ready to thwart the national government if excluded from a participation in it. The idea of abolishing these legislatures would never go down."[200]

Pinckney was acute enough to realize immediately that the New Jersey plan was put forth on behalf of equal representation for the small states and not in the interest of state sovereignty. Thus, on June 16: "The whole comes to this, as he conceived. Give New Jersey an equal vote, and she will dismiss her scruples, and concur in the national system. He thought the Convention authorized to go any length in recommending which they found necessary to remedy the evils which produced this Convention."[201] Yates' notes for that day record "Mr. C. C. Pinckney supposes that if New Jersey was indulged with one vote out of 13, she would have no objection to a national government. He supposes that the convention have already determined, virtually, that the federal government cannot be made efficient. A national government being therefore the object, this plan must be pursued—as our business is not to conclude but to recommend."[202]

Pinckney favored property qualifications for all members of all branches of the national government. He opposed paying salaries to Senators, on the ground that this would assure that only the wealthy could serve. When this was voted down, however, "General Pinckney was for making the states as much as could be conveniently done a part of the general government. If the Senate was to be appointed by the states, it ought in pursuance of the same idea to be paid by the states; and the states ought not to be barred from the opportunity of calling members of it into offices at home."[203] On the term for Senators, "General Pinckney proposed '4 years.' A longer term would fix them at the seat of government. They would acquire an interest there, perhaps transfer their property and lose sight of the states they represent. Under these

2001 Records 137.
2011 Records 255.
2021 Records 261.
2031 Records 429.

circumstances the distant states would labour under great disadvantages."[204] His military experience prompted a belief that the regulation and discipline of the militia should be within the province of the national government. "General Pinckney mentioned a case during the war in which a dissimilarity in the militia of different states had produced the most serious mischiefs. Uniformity was essential. The states would never keep up a proper discipline of their militia."[205] Consequently he opposed divided control. "General Pinckney renewed Mr. Mason's original motion. For a part to be under the general and a part under the state governments would be an incurable evil. He saw no room for such distrust of the new general government."[206] He defended slavery, but opposed religious qualifications for office. Near the end of the Convention: "He had himself, he said, prejudices against the Eastern States before he came here, but would acknowledge that he had found them as liberal and candid as any men whatever."[207]

Pinckney was a member of the ratification convention in South Carolina, where he strongly supported the Constitution. Subsequently he was the Federalist candidate for vice-president in 1800, and for President in 1804 and 1808.

3. *Pierce Butler.* Son of a nobleman and always vain about the fact, Butler was born in Ireland and came in 1773 to South Carolina, where he became a planter and politician. From 1778 to 1789 he was almost constantly in the state legislature, where, although possessed of wealth and property himself, he failed to align himself with the planter-merchant group (probably because of personal rivalry) and backed many of the reform measures of the back-country democrats.

In the Convention Butler was moderate in his approach to a strong central government. When the Virginia propositions had been introduced, on May 31 "Mr. Butler apprehended that the taking so many powers out of the hands of the states as was proposed, tended to destroy all that balance and security of interests among the states which it was necessary to preserve; and called on Mr. Randolph, the mover of the propositions, to explain the extent of his ideas . . . .[208] Mr. Butler repeated his fears that we were running into an extreme in taking away the powers of the states, and called on Mr. Randolph for the extent of his meaning."[209] On the proposal to establish inferior tribunals, Butler was in opposition. "The people will not bear such innovations. The states will revolt at such encroachments. Supposing such an establishment to be useful, we must not venture on it. We must follow the example

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2041 Records 409.
2052 Records 330.
2062 Records 331.
2072 Records 450.
2081 Records 51.
2091 Records 53.

of Solon who gave the Athenians not the best government he could devise; but the best they would receive."[210] And again "Mr. Butler could see no necessity for tribunals. The state tribunals might do the business."[211] He was also against the Congressional negative. On June 8 "Mr. Butler was vehement against the negative in the proposed extent, as cutting off all hope of equal justice to the distant states. The people there would not, he was sure, give it a hearing."[212] And Hamilton's notes for the same day record: "Butler — will a man throw afloat his property and confide it to a government a thousand miles distant."[213]

Butler was adamant on the principle that property should be represented as such in Congress. Thus, on June 11 "Mr. Butler urged the same idea, adding that money was power, and that the states ought to have weight in the government in proportion to their wealth."[214] Yates recorded him on June 26: "Mr. Butler. This second branch I consider as the aristocratic part of our government; and they must be controlled by the states, or they will be too independent."[215] And on July 5' "He urged that the second branch ought to represent the states according to their property."[216] An extract from King's notes would indicate that Butler was more interested in protecting property rights than state rights. "Butler — I am against determining the mode of election until the ratio of representation is fixed. If that proceeds on a principle favorable to wealth as well as numbers of free inhabitants, I am content to unite with Delaware (Mr. Read) in abolishing the state legislatures, and becoming one Nation instead of confederation of republics."[217] Butler was in favor of national control of the militia. "Mr. Butler urged the necessity of submitting the whole militia to the general authority which had the care of the general defence."[218] A slaveholder, he insisted on the inclusion of a rendition clause.

Butler defended the Constitution in South Carolina, but was not a member of the ratification convention. He was elected a Federalist Senator in 1789 and again in 1802, resigning each time and never bothering to follow party lines very closely.

4. *Charles Pinckney.* Like his father, Pinckney was a wealthy planter and lawyer in Charlestown. He had served in the state legislature and had been a member of Congress from 1784 to 1787. There he had sought to increase central powers, and had served on a committee which made extensive recommendations in that direction. These not

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210 1 Records 125.
211 2 Records 45.
212 1 Records 168.
213 1 Records 173.
214 1 Records 196.
215 1 Records 434.
216 1 Records 529.
217 1 Records 144.
218 2 Records 331.

being adopted, he supported the idea of a general convention. On May 29, after the Virginia plan had been presented, Pinckney submitted to the Convention his own draft of a plan for a new government. Just what ever happened to it is not known, and the exact contents of the missing "Pinckney draft" have been a historical puzzle since then. He had also prepared a speech in connection with his presentation of the plan. It was never delivered, but it was published shortly after the Convention was over."[219] This pamphlet therefore accurately reflects Pinckney's views, at the time of the Convention, on the question of national supremacy and state sovereignty. Relevant extracts follow.

"I apprehend the true intention of the States in uniting, is to have a firm national government, capable of effectually executing its acts, and dispensing its benefits and protection. In it alone can be vested those powers and prerogatives which more particularly distinguish a sovereign state . . . . The idea which has been so long and falsely entertained of each being a sovereign state, must be given up; for it is absurd to suppose there can be more than one sovereignty within a government. The states should retain nothing more than that mere local legislation, which, as districts of a general government, they can exercise more to the benefit of their particular inhabitants, than if it was vested in the supreme council; but in every foreign concern, as well as those internal regulations, which respecting the whole ought to be uniform and national, the states must not be suffered to interfere. No act of the Federal Government in pursuance of its constitutional powers ought by any means to be within the control of the state legislatures; if it is, experience warrants me in asserting, they will assuredly interfere and defeat its operation . . . . It is agreed that a reform of our government is indispensable, and that a stronger federal system must be adopted; but it will ever be found, that let your system upon paper be as complete, and guarded as you can make it, yet still if the state assemblies are suffered to legislate without restriction or revision, your government will remain weak, disjointed, and inefficient . . . .

Whatever views we may have of the importance of retained sovereignty of the states, be assured they are visionary and unfounded, and that their true interests consist in concentrating as much as possible, the force and resources of the Union in one superintending government where alone they can be exercised with effect. In granting to the Federal Government certain exclusive national powers, you invest all their incidental rights. The term exclusive involves every right or authority necessary to their execution. . . .

Though our present disorders must be attributed in the first instance to the weakness and inefficacy of our government, it must still

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[219] 3 Records 106.

be confessed, they have been precipitated by the refractory and inattentive conduct of the states, most of which have neglected altogether the performance of their federal duties, and whenever their state policy or interests prompted, used their retained sovereignty, to the injury and disgrace of the federal head. Nor can any other conduct be expected, while they are suffered to consider themselves as distinct sovereignties, or in any other light, than as parts of a common government. . . .

In short, from their example, and from our own experience, there can be no truth more evident than this, that, unless our government is consolidated, as far as is practicable, by retrenching the state authorities, and concentrating as much force and vigor in the Union, as are adequate to its exigencies, we shall soon be a divided, and consequently an unhappy people. I shall ever consider the revision and negative of the state laws as one great and leading step to this reform, and have therefore conceived it proper, to bring it into view . . . .

I am doubtful whether the Convention will at first be inclined to proceed as far as I have intended; but this I think may be safely asserted, that upon a clear and comprehensive view of the relative situation of the Union, and its members, we shall be convinced of the policy of concentrating in the federal head, a complete supremacy in the affairs of government; leaving only to the states such powers as may be necessary for the management of their internal concerns."[220]

Like Madison, Pinckney believed that the Congressional negative was essential to the maintenance of national supremacy. On June 8, "Mr. Pinckney moved 'that the National Legislature should have authority to negative all laws which they should judge to be improper.' He urged that such a universality of the power was indispensably necessary to render it effectual; that the states must be kept in due subordination to the nation; that if the states were left to act of themselves in any case, it would be impossible to defend the national prerogatives, however extensive they might be on paper; that the acts of Congress had been defeated by this means; nor had foreign treaties escaped repeated violations; that this universal negative was in fact the corner stone of an efficient national government, that under the British Government the negative of the Crown had been found beneficial, and the states are more one nation now, than the colonies were then."[221] Again on July 17 "Mr. Pinckney urged the necessity of the negative."[222] As late in the Convention as August 23, "Mr. Pinckney moved to add as an additional power to be vested in the legislature of the U. S. 'To negative all laws passed by the several states interfering in the opinion of the legislature with the general interests and harmony of the Union, provided that

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220 3 Records 112-123, passim.
221 1 Records 164.
222 2 Records 28.

two thirds of the members of each House assent to the same.' This principle, he observed, had formerly been agreed to. He considered the precaution as essentially necessary; the objection drawn from the predominance of the large States had been removed by the equality established in the Senate."[223]

On the other hand, Pinckney did not believe that the states should be obliterated, but considered that they would be useful, even necessary, for local purposes. Thus, on June 25 he stated that "No position appears to me more true than this; that the general government can not effectually exist without reserving to the states the possession of their local rights. They are the instruments upon which the Union must frequently depend for the support and execution of their powers, however immediately operating upon the people, and not upon the states. Much has been said about the propriety of abolishing the distinction of state governments, and having but one general system. Suffer me for a moment to examine this question."[224] Unfortunately, for the purposes of this inquiry, the remainder of the speech from this point on does not appear in Madison's notes.

After supporting ratification in the South Carolina convention, Pinckney served as governor from 1789 to 1792, and again in 1796-98. Gradually he became Republican in his politics, was elected to the Senate in 1798, and served as Jefferson's manager in South Carolina, for which service he was rewarded with the appointment as minister to Spain from 1801 to 1805. Subsequently he was again elected governor, served in the state legislature, and in Congress.

THE MASSACHUSETTS DELEGATES

1. *Nathaniel Gorham.* A merchant from Charlestown who also engaged in large scale land speculation, Gorham had served in the colonial assembly, the provincial congress, the state constitutional convention, the state legislature, of which he was speaker three times, and was a delegate to Congress in 1782-83 and again in 1785-87.

In the Convention, Gorham was a consistent advocate of national power. On June 29 he addressed himself to the fears of the small states by stressing the advantages of a strong union.

"The States as now confederated have no doubt a right to refuse to be consolidated, or to be formed into any new system. But he wished the small states, which seemed most ready to object, to consider which are to give up most, they or the larger ones. He conceived that a rupture of the Union would be an event unhappy for all, but surely the large states would be least unable to take care of themselves, and to make

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2232 Records 390.
2241 Records 404.

connections with one another. The weak, therefore, were most interested in establishing some general system for maintaining order. If among individuals, composed partly of weak, and partly of strong, the former most need the protection of law and government, the case is exactly the same with weak and powerful states. What would be the situation of Delaware (for these things, he found, must be spoken out, and it might as well be done first as last) what would be the situation of Delaware in case of a separation of the states? Would she not lie at the mercy of Pennsylvania? Would not her true interest lie in being consolidated with her, and ought she not now to wish for such a union with Pennsylvania under one government as will put it out of the power of Pennsylvania to oppress her? Nothing can be more ideal than the danger apprehended by the states, from their being formed into one nation. Massachusetts was originally three colonies, viz, old Massachusetts, Plymouth, and the province of Maine. These apprehensions existed then. An incorporation took place; all parties were safe and satisfied; and every distinction is now forgotten. The case was similar with Connecticut and Newhaven. The dread of union was reciprocal; the consequence of it equally salutary and satisfactory. In like manner New Jersey has been made one society out of two parts. Should a separation of the states take place, the fate of New Jersey would be worst of all. She has no foreign commerce and can have but little. Pennsylvania and New York will continue to levy taxes on her consumption. If she consults her interests she would beg of all things to be annihilated . . . . On the whole he considered a union of the states as necessary to their happiness, and a firm general government as necessary to their Union. He should consider it as his duty if his colleagues viewed the matter in the same light he did, to stay here as long as any other state would remain with them, in order to agree on some plan that could with propriety be recommended to the people."[225]

On July 6: "He hoped to see all the states made small by proper divisions, instead of their becoming formidable as was apprehended, to the Small States. He conceived that let the general government be modified as it might, there would be a constant tendency in the state governments to encroach upon it; it was of importance therefore that the extent of the states should be reduced as much and as fast as possible. The stronger the government shall be made in the first instance the more easily will these divisions be effected, as it will be of less consequence in the opinion of the states whether they be of great or small extent."[226] On July 23 he emphasized that "The strength of the general

[225] 1 Records 462.
[226] 1 Records 540.

government will lie not in the largeness, but in the smallness of the states."[227]

On July 18 he stated that "Inferior tribunals are essential to render the authority of the national legislature effectual."[228] On the same day he upheld the power of the national government to forcibly suppress rebellion within a state. "Mr. Gorham thought it strange that a rebellion should be known to exist in the empire, and the general government should be restrained from interposing to subdue it. At this rate an enterprising citizen might erect the standard of monarchy in a particular state, might gather together partisans from all quarters, might extend his views from state to state, and threaten to establish a tyranny over the whole and the general government be compelled to remain an inactive witness of its own destruction. With regard to different parties in a state; as long as they confine their disputes to words they will be harmless to the general government and to each other. If they appeal to the sword it will then be necessary for the general government, however difficult it may be to decide on the merits of their contest, to interpose and put an end to it."[229] On August 9 he supported the power of Congress to control the conduct of Congressional elections. "It would be as improper to take this power from the national legislature, as to restrain the British Parliament from regulating the circumstances of elections, leaving this business to the counties themselves."[230]

Gorham was a member of the state convention where he actively urged ratification of the Constitution. Shortly thereafter, as a result of his speculations, he became insolvent and died.

2. *Rufus King.* A Harvard graduate who inherited wealth and married wealth, King had been in both the state legislature and in Congress. He was originally opposed to any radical change in the Articles and advocated merely increasing the powers of Congress. By the time of the Convention, however, he had become committed to a strong national government.

King was one of those who denied that the states had ever been sovereign in the fullest sense of the word, even before and during the Articles. On June 19, in supporting the Randolph proposal that a national government be established, "Mr. King wished, as everything depended on this proposition, that no objections might be improperly indulged against the phraseology of it. He conceived that the import of the terms "state," "sovereignty," "national," "federal," had been often used and applied in the discussion inaccurately and delusively. The states were not sovereigns in the sense contended for by some. They did

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227 2 Records 94.
228 2 Records 46.
229 2 Records 48.
230 2 Records 240.

not possess the peculiar features of sovereignty. They could not make war, nor peace, nor alliances, nor treaties. Considering them as political beings, they were dumb, for they could not speak to any foreign sovereign whatever. They were deaf, for they could not hear any propositions from such sovereign. They had not even the organs or faculties of defence, for they could not of themselves raise troops, or equip vessels, for war. On the other side, if the Union of the states comprises the idea of a confederation, it comprises that also of consolidation. A Union of the states is a union of the men composing them, from whence a *national* character results to the whole. Congress can act alone without the states—they can act and their acts will be binding against the instructions of the states. If they declare war, war is de jure declared, captures made in pursuance of it are lawful. No acts of the states can vary the situation or prevent the judicial consequences. If the states therefore retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it. If they formed a confederacy in some respects—they formed a Nation in others. The Convention could clearly deliberate on and propose any alterations that Congress could have done under the federal articles. And could not Congress propose by virtue of the last article, a change in any article whatever, and as well that relating to the equality of suffrage, as any other. He made these remarks to obviate some scruples which had been expressed. He doubted much the practicability of annihilating the states, but thought that much of their power ought to be taken from them."[231]

Aware of the rivalry between the states and the central government, King opposed the election of members of Congress by the state legislatures. "Mr. King enlarged on the same distinction. He supposed that legislatures would constantly choose men subservient to their own views as contrasted to the general interest; and that they might even devise modes of election that would be subversive of the end in view. He remarked several instances in which the views of a state might be at variance with those of the general government and mentioned particularly a competition between the national and state debts, for the most certain and productive funds."[232] Yates' notes for the same day record: "Mr. King. The magistrates of the states will ever pursue schemes of their own, and this, on the proposed motion, will pervade the national government — and we know the state governments will be ever hostile to the general government."[233]

King was opposed to the equality of representation in the Senate because it tended to perpetuate ideas of state sovereignty. On June 30

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231 1 Records 323.
232 1 Records 359.
233 1 Records 365.

he stated "that he was however filled with astonishment that if we were convinced that every *man* in America was secured in all his rights, we should be ready to sacrifice this substantial good to the phantom of *state* sovereignty; that his feelings were more harrowed and his fears more agitated for his country than he could express, that he conceived this to be the last opportunity of providing for its liberty and happiness; that he could not therefore but repeat his amazement that when a just government founded on a fair representation of the *people* of America was within our reach, we should renounce the blessing, from an attachment to the ideal freedom and importance of *states;* that should this wonderful illusion continue to prevail, his mind was prepared for every event, rather than sit down under a government founded in a vicious principle of representation and which must be as short lived as it would be unjust."[234] His desire to free the central government from the control of the states was expressed again on August 9 in connection with the power to control the conduct of Congressional elections. "Mr. King. If this power be not given to the national legislature, their right of judging of the returns of their members may be frustrated. No probability has been suggested of its being abused by them. Altho this scheme of erecting the general government on the authority of the state legislatures has been fatal to the federal establishment, it would seem as if many gentlemen still foster the dangerous idea."[235]

Although he decried state sovereignty, King believed that the states should continue to perform important functions. Thus, on June 30 "Mr. King was for preserving the states in a subordinate degree, and as far as they could be necessary for the purposes stated by Mr. Ellsworth. He did not think a full answer had been given to those who apprehended a dangerous encroachment on their jurisdictions. Expedients might be devised as he conceived that would give them all the security the nature of things would admit of. In the establishment of societies the constitution was to the legislature what the laws were to individuals. As the fundamental rights of individuals are secured by express provisions in the state Constitutions, why may not a like security be provided for the rights of states in the national Constitution."[236] And on August 7, with regard to the frequency of sessions of Congress, "Mr. King could not think there would be a necessity for a meeting every year. A great vice in our system was that of legislating too much. The most numerous objects of legislation belong to the states. Those of the national legislature were but few. The chief of them were commerce and revenue. When these should be once settled, alterations would be rarely neces-

[234] 1 Records 489.
[235] 2 Records 241.
[236] 1 Records 492.

sary and easily made."[237]

King was a member of the important committee on style which put the Constitution in its final form, and was also a leading advocate of ratification in the Massachusetts convention. He then moved to New York, where he was elected to the Senate in 1789 and again in 1795. There he was one of the ablest of the Federalists and supported all of the nationalist proposals of the administration. Appointed minister to England in 1796, he was so successful that he continued in this post under Jefferson, finally being relieved at his own request. He was the Federalist candidate for vice-president in 1804 and again in 1808, was twice thereafter reelected to the Senate, and was the Federalist candidate for president in 1816.

3. *Elbridge Gerry.* A merchant's son and a Harvard graduate who married into a merchant family, Gerry was a signer of the Declaration of Independence and had twice been a delegate to Congress. In the Convention he was one of the most frequent speakers, but his positions were often inconsistent, and he lacked the ability to always distinguish the important from the trivial. Consequently, his influence was not commensurate with the extent of his participation. One of the delegates, in a letter to Jefferson after the Convention was over, described him as ". . . a man of sense, but a Grumbletonian. He was of service by objecting to every thing he did not propose."[238]

Gerry started out by supporting a strong central government. On June 29 "Mr. Gerry urged that we never were independent states, were not such now, and never could be even on the principles of the Confederation. The states and the advocates for them were intoxicated with the idea of their *sovereignty*. He was a member of Congress at the time the federal articles were formed. The injustice of allowing each state an equal vote was long insisted on. He voted for it, but it was against his judgment and under the pressure of public danger, and the obstinacy of the lesser states. The present confederation he considered as dissolving. The fate of the Union will be decided by the Convention. If they do not agree on something, few delegates will probably be appointed to Congress. If they do, Congress will probably be kept up till the new system should be adopted. He lamented that instead of coming here like a band of brothers, belonging to the same family, we seemed to have brought with us the spirit of political negotiators."[239] Yates' notes the same day record: "Mr. Gerry. It appears to me that the states never were independent—they had only corporate rights. Confederations are a mongrel kind of government."[240] And on July 23 he stated that

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[237] 2 Records 198.
[238] 3 Records 104.
[239] 1 Records 467.
[240] 1 Records 474.

"Both the state governments and the federal government have been too long asquiesced in, to be now shaken. He considered the Confederation to be paramount to any state constitution."[241] His opposition to a motion to bypass the states in the election of the president was based on expediency rather than state attachment. "He liked the principle of Mr. Wilson's motion, but fears it would alarm and give a handle to the state partisans, as tending to supersede altogether the state authorities. He thought the community not yet ripe for stripping the states of their powers, even such as might not be requisite for local purposes. He was for waiting till people should feel more the necessity of it."[242]

On the other hand, on July 6: "Mr. Gerry did not think with his colleague that the large states ought to be cut up. This policy has been inculcated by the middling and smaller states, ungenerously and contrary to the spirit of the Confederation. Ambitious men will be apt to solicit needless divisions, till the states be reduced to the size of counties. If this policy should still actuate the small states, the large ones could not confederate safely with them, but would be obliged to consult their safety by confederating only with one another."[243] He was also opposed to the Congressional negative. Thus, on June 8: "Mr. Gerry could not see the extent of such a power, and was against every power that was not necessary. He thought a remonstrance against unreasonable acts of the states would reclaim them. If it should not, force might be resorted to. He had no objection to authorize a negative to paper money and similar measures. When the confederation was depending before Congress, Massachusetts was then for inserting the power of emitting paper money among the exclusive powers of Congress. He observed that the proposed negative would extend to the regulations of the militia, a matter on which the existence of a state might depend. The national legislature with such a power may enslave the states. Such an idea as this will never be acceded to. The states too have different interests and are ignorant of each other's interest. The negative therefore will be abused . . . ."[244] On June 7: "Mr. Gerry insisted that the commercial and monied interest would be more secure in the hands of the state legislatures, than of the people at large. The former have more sense of character, and will be restrained by that from injustice."[245]

On the matter of representation he "thought that representation ought to be in the combined ratio of members of inhabitants and of wealth, and not of either singly."[246] And on the compromise providing for equal representation in the Senate; "Mr. Gerry. This is the critical

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241 2 Records 89.
242 1 Records 80.
243 1 Records 540.
244 1 Records 165.
245 1 Records 154.
246 1 Records 540.

question. He had rather agree to it than have no accomodation. A government short of a proper national plan if generally acceptable, would be preferable to a proper one which if it could be carried at all, would operate on discontented states."[247] On July 14, "He favored the reconsideration with a view not of destroying the equality of votes, but of providing that the states should vote per capita, which he said would prevent the delays and inconveniences that had been experienced in Congress and would give a national aspect and spirit to the management of business."[248]

On the question of requiring all state officers to take an oath to uphold the Constitution and national laws, on June 11 "Mr. Gerry did not like the clause. He thought there was as much reason for requiring an oath of fidelity to the states, from national officers, as vice versa."[249] By July 23, however, on the same question: "Nor could he see any other harm that could result from the resolution. On the other side he thought one good effect would be produced by it. Hitherto the officers of the two governments had considered them as distinct from, not as parts of the general system, and had in all cases of interference given a preference to the state governments. The proposed oaths will cure that error . . . ."[250] On the proposal to empower the national government to suppress domestic violence, "Mr. Gerry was against letting loose the myrmidons of the United States on a state without its own consent. The states will be the best judges in such cases. More blood would have been spilt in Massachusetts in the late insurrection, if the general authority had intermeddled."[251]

On the question of national regulation and discipline of the militia, Gerry was vehement in his opposition. On August 18, "Mr. Gerry thought this the last point remaining to be surrendered. If it be agreed to by the Convention, the plan will have as black a mark as was set on Cain. He had no such confidence in the general government as some gentlemen possessed, and believed it would be found that the states have not."[252] On August 23: "This power in the U. S. as explained is making the states drill-sergeants. He had as lief let the citizens of Massachusetts be disarmed, as to take the command from the states, and subject them to the general legislature. It would be regarded as a system of despotism."[253] And the same day: "Mr. Gerry. Let us at once destroy the state governments, have an executive for life or hereditary, and a proper senate, and then there would be some consistency in giving full powers to the gen-

247 1 Records 550.
248 2 Records 5.
249 1 Records 203.
250 2 Records 88.
251 2 Records 317.
252 2 Records 332.
253 2 Records 385.

eral government, but as the states are not to be abolished, he wondered at the attempts that were made to give powers inconsistent with their existence. He warned the Convention against pushing the experiment too far. Some people will support a plan of vigorous government at every risk. Others of a more democratic case will oppose it with equal determination. And a civil war may be produced by the conflict."[254]

In the end Gerry refused to sign the Constitution. The gist of his opposition was what he considered the excessive and unlimited scope of the powers vested in the new national government, and the absence of sufficient limitations on those powers. He opposed the ratification of the Constitution in Massachusetts, and ran for Governor in 1788 as an anti-Federalist, but was defeated. His inconsistency cropped out again when he went to Congress in 1789 and supported Federalist policies and programs. He was later elected governor as a Republican, when he immortalized himself by his use of what is known as the gerrymander, and was thereafter elected vice-president in 1812.

4. *Caleb Strong.* Another Harvard graduate and a lawyer of Northampton, Strong had been a county attorney, a member of the state constitutional convention of 1789, and was a state senator from 1780-89. He left the Convention in August on business, and during his attendance spoke only a few times. While not present for the signing, he was a leading supporter of the Constitution in the Massachusetts ratifying convention. He was elected Senator in 1789, and became a Federalist bulwark. Reelected in 1793, he resigned three years later. In 1880, despite the Jeffersonian sweep, he was elected governor as a Federalist, defeating Gerry, and was subsequently reelected six times. During the war of 1812 he refused to furnish state troops for national use.

THE MARYLAND DELEGATES

1. *James McHenry.* Born and educated in Ireland, McHenry came in 1771 to Baltimore, where his father established an importing house which the son inherited. He studied medicine, and served as a surgeon during the early years of the war, and was then on the staff of Washington and Lafayette. Abandoning medicine for politics, he served in the Maryland legislature and as a delegate to Congress. Not a man of marked ability, he was absent from the Convention during June and July, and made no significant contribution to the Constitution. During his attendance, he made notes on the proceedings, which indicate that he was more mindful of state interests than nationalist in his participation. Thus, he believed that the confederation was "susceptible of a revision which would sufficiently invigorate it for the exigencies of the times."[255]

254 2 Records 388.
255 2 Records 191.

He also thought the states should participate in the selection of the ports of entry, and that the state governors should share in the power of appointment of officers of the national government. He nevertheless signed the Constitution, although opposed to many parts of the system. His reasons were his distrust in his own judgment, his confidence in the leadership of the Convention, and because "Comparing the inconveniences and the evils which we labor under and may experience from the present confederation, and the little good we can expect from it—with the possible evils and probable benefits and advantages promised us by the new system. I am clear that I ought to give it all the support in my power."[256] McHenry was a member of the state ratification convention, and became a confirmed Federalist, serving in the state legislature from 1789 to 1796 and as Secretary of War from 1796 to 1800.

2. *Daniel of St. Thomas Jenifer.* The holder of various offices under the proprietary government and a man of considerable wealth, Jenifer had been president of the state senate and a delegate to Congress. He was a bachelor and a close friend of Washington. His role in the Convention was a minor one, but his few recorded positions were nationalist. Thus, he was opposed to mere amendment of the Articles, to equality of state representation in the Senate, and to having state governors share in the power to appoint officers of the United States. He signed the Constitution and supported its ratification.

3. *Daniel Carroll.* Educated in Flanders and the heir of a large estate, Carroll had served as a delegate to Congress. In the Convention his participation was not extensive, but was decidedly nationalist. He "did not think the confederation could be amended to answer its intentions."[257] He was opposed to having state governors share in the power of appointing officers of the United States, and was also opposed to members of Congress being dependent on the states for their compensation. On this latter point, he said he "had been much surprised at seeing this clause in the report. The dependence of both houses on the state legislatures is complete; especially as the members of the former are eligible to state offices. The states can now say: if you do not comply with our wishes, we will starve you: if you do we will reward you. The new government in this form was nothing more than a second edition of Congress in two volumes, instead of one . . . . The Senate was to represent and manage the affairs of the whole, and not to be the advocates of state interests. They ought then not to be dependent on nor paid by the states."[258] In 1789 Carroll was chosen one of Maryland's first Senators, and in 1791 he became one of the first commissioners of the District of Columbia, which was located on land which he had owned.

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256 2 Records 649.
257 2 Records 190.
258 2 Records 292.

4. *John Francis Mercer.* Born in Virginia of a wealthy plantation owner and lawyer, Mercer was a graduate of William and Mary and had an active military career during the revolution. He became a lawyer and served twice in the Virginia legislature and also as a delegate to Congress, then moved to Maryland. Mercer was well aware of the forces which had brought about the Convention. On a state residence requirement for election to Congress, he said that "Such a regulation would present a greater alienship among the states than existed under the old federal system. It would interweave local prejudices and state distinctions in the very Constitution which is meant to cure them."[259] He referred to "those speculating legislatures which are now plundering the people throughout the United States."[260] And on another occasion he stated: "What led to the appointment of this Convention? The corruption and mutability of the legislative councils of the states. If the plan does not remedy these, it will not recommend itself, and we shall not be able in our private capacities to support and enforce it; nor will the best part of the citizens exert themselves for the purpose."[261]

According to McHenry, Mercer stated his disbelief that the Articles could be saved by amendment. And yet he stated that "It is a great mistake to suppose that the paper we are to propose will govern the United States. It is the men whom it will bring into the government and interest in maintaining it that is to govern them. The paper will only mark out the mode and the form. Men are the substance and must do the business. All government must be by force or influence."[262] Mercer left the Convention sometime during the middle of August and did not return. When the Constitution was submitted for ratification, he cast his lot with Luther Martin in opposition. Quickly he became the trenchant leader of the anti-federalist faction in Maryland, and was forever thereafter an opponent of a strong central government. He served in the Maryland legislature durirng 1788-91, in Congress during 1791-94, and later as Republican governor of Maryland.

5. *Luther Martin.* Son of a farmer, Martin had managed to graduate from Princeton and, after a stint as a schoolteacher, studied law and was admitted to the bar. He had been a delegate to Congress, and was in 1778 appointed attorney-general of Maryland, a position he held until 1805.

In the Convention Martin was an outspoken advocate of state sovereignty. His basic views were set forth in a speech delivered on June 20. "Mr. Luther Martin agreed with Col. Mason as to the importance of the state governments. He would support them at the expense of the

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259 2 Records 217.
260 2 Records 285.
261 2 Records 288.
262 2 Records 289.

general government which was instituted for the purpose of that support. At the separation from the British Empire, the people of America preferred the establishment of themselves into thirteen separate sovereignties instead of incorporating themselves into one. To these they look up for the security of their lives, liberties and properties, to these they must look up. The federal government they formed to defend the whole against foreign nations, in case of war, and to defend the lesser states against the ambition of the larger. They are afraid of granting powers unnecessarily, lest they should defeat the original end of the Union; lest the powers should prove dangerous to the sovereignties of the particular states which the Union was meant to support; and expose the lesser to being swallowed up by the larger."[263] According to Yates' notes for that day Martin said "I would support the state government at the expense of the union—for I consider the present system as a system of slavery."[264] And King's notes record the following: "Martin. I think the Confederation was formed for the protection and safety of the particular states and not for those of the US. I will not support the general government at the expense of the particular states, but I will contend for the safety and happiness of the particular states at the expense of the US."[265] On June 27 "Mr. L. Martin contended at great length and with great eagerness that the general government was meant merely to preserve the state governments, not to govern individuals; that its power ought to be kept within narrow limits; that if too little power was given to it, more might be added; but that if too much, it could never be resumed . . . ."[266]

Unfortunately for Martin's cause, he was a boring and prolix speaker. Yates, who was sympathetic to Martin's views, noted that "Mr. Martin, the attorney general from Maryland, spoke on this subject upwards of three hours. As his arguments were too diffuse, and in many instances desultory, it was not possible to trace him through the whole, or to methodize his ideas into a systematic or argumentative arrangement."[267] On June 28: "Mr. L. Martin resumed his discourse, contending that the general government ought to be formed for the states, not for individuals[268] . . . and that he had rather see partial confederacies take place, than the plan on the table. This was the substance of the residue of his discourse which was delivered with much diffuseness and considerable vehemence."[269] According to Yates: "What is the government now forming, over states or persons? As to the latter, their rights cannot be the object of a general government — these are already secured by their

263 1 Records 340.
264 1 Records 347.
265 1 Records 349.
266 1 Records 437.
267 1 Records 438.
268 1 Records 444.
269 1 Records 445.

guardians, the state governments. The general government is therefore intended only to protect and guard the rights of the states as states."[270] On June 29: "Mr. L. Martin remarked that the language of the states being *sovereign and independent,* was once familiar and understood; though it seemed now so strange and obscure. He read those passages in the articles of Confederation, which describe them on that language."[271]

Martin's positions on particular issues in the Convention were consistent with his general philosophy. Unlike other small state delegates, he was for state equality of representation because to him it was a corollary of state sovereignty. Thus, on June 19: "Mr. Martin, said he considered that the separation from Great Britain placed the thirteen states in a state of nature towards each other; that they would have remained in that state till this time, but for the confederation; that they entered into the confederation on the footing of equality; that they met now to amend it on the same footing, and that he could never accede to a plan that would introduce an inequality and lay ten states at the mercy of Virginia, Massachusetts and Pennsylvania."[272] And on June 27 he stated that "an equal vote in each state was essential to the federal idea, and was founded in justice and freedom, not merely in policy; that though the states may give up this right of sovereignty, yet they had not, and ought not; that the states, like individuals, were in a state of nature, equally sovereign and free . . .[273] that the states, particularly the smaller, would never allow a negative to be exercised over their laws; that no state in ratifying the Confederation had objected to the equality of votes; that the complaints at present run not against this equality but the want of power . . . ."[274]

Naturally, he was opposed to the Congressional negative. "Mr. L. Martin considered the power as improper and inadmissible. Shall all the laws of the states be sent up to the general legislature before they shall be permitted to operate?"[275] He was also opposed to giving Congress the power to create inferior tribunals. "Mr. L. Martin concurred. They will create jealousies and oppositions in the state tribunals, with the jurisdiction of which they will interfere."[276] On the matter of suppressing rebellions within the state, "Mr. L. Martin was for leaving the states to suppress rebellions themselves."[277] And on a motion not to require the request of the state, "Mr. L. Martin opposed it as giving a

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2701 Records 453.
2711 Records 468.
2721 Records 324.
2731 Records 437.
2741 Records 438.
2752 Records 27.
2762 Records 45.
2772 Records 48.

dangerous and unnecessary power. The consent of the state ought to precede the introduction of any extraneous force whatever."[278] As to the method of voting in the Senate, "Mr. L. Martin was opposed to voting per capita, as departing from the idea of the *states* being represented in the second branch."[279] And on the matter of compensation of Senators, "Mr. L. Martin. As the Senate is to represent the states, the members of it ought to be paid by the states."[280]

Perceiving that his views in support of state sovereignty and in opposition to a strong central government were almost invariably overridden by the other delegates, Martin left the Convention in disgust early in September. He expressed his opposition to the Constitution in a strong address to the Maryland legislature in November, 1787, and the next year, as a member of the state convention, fought against ratification. Due largely to a personal dispute with Jefferson, Martin later allied himself politically with the Federalists. He was one of the counsel who defended Justice Chase in his impeachment trial, and Aaron Burr in his trial for treason. He was reappointed attorney-general in 1818 and argued the case of *McCulloch v. Maryland* for the state. He resigned in 1822 and spent his remaining years in New York in the Burr home.

THE CONNECTICUT DELEGATES

1. *William Samuel Johnson.* A Yale graduate with a master's degree from Harvard and a doctor of laws from Oxford, Johnson was probably the best educated man in the Convention. He had been a delegate to the Stamp Act Congress and the First Continental Congress, but declined reappointment because he could not in conscience support war against England. He therefore undertook no military or political career during the revolution, but was able notwithstanding to retain his personal popularity. He served in Congress during 1785-87, and in 1787, just before the Convention, he was chosen president of Columbia College.

In the Convention Johnson was diligent in his attendance and widely respected by the other delegates. His position was that of a strong nationalist who nevertheless recognized the importance of the states. On June 21 he analyzed the situation as follows: "On a comparison of the two plans which had been proposed from Virginia and New Jersey, it appeared that the peculiarity which characterized the latter was its being calculated to preserve the individuality of the states. The plan from Virginia did not profess to destroy this individuality altogether, but was charged with such a tendency. One gentleman alone (Col. Hamilton) in his animadversions on the plan of New Jersey, boldly and

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278 2 Records 317.
279 2 Records 94.
280 2 Records 292.

decisively contended for an abolition of the state governments. Mr. Wilson and the gentleman from Virginia, who also were adversaries of the plan of New Jersey, held a different language. They wished to leave the states in possession of a considerable, though a subordinate, jurisdiction. They had not yet however shown how this could consist with, or be secured against, the general sovereignty and jurisdiction, which they proposed to give to the national government. If this could be shown in such a manner as to satisfy the patrons of the New Jersey proposition, that the individuality of the states would not be endangered, many of their objections would no doubt be removed. If this could not be shown their objections would have their full force. He wished it therefore to be well considered whether in case the states, as was proposed, should retain some portion of sovereignty at least, this portion could be preserved, without allowing them to participate effectually in the general government, without giving them each a distinct and equal vote for the purpose of defending themselves in the general councils."[281]

King's notes for the day record: "Johnson—The Gentleman from New York is praised by every gentleman, but supported by no gentleman. He goes directly to the abolition of the state governments and the erection of a general government. All other gentlemen agree that the national general government should be more powerful, and the state governments less so. Provision is made in the Virginia project to secure the general government, but no provision is made for the security of the state government. The plan from New Jersey provides for the security of the state and general government. If the advocates for the general government agreeably to the Virginia plan can show that the state governments will be secure from the general government we may all agree."[282] On June 25 "Doctor Johnson urged the necessity of preserving the state governments, which would be at the mercy of the general government on Mr. Wilson's plan."[283]

On June 29 he set forth the basis of the compromise which was eventually reached. "Doctor Johnson. The controversy must be endless whilst gentlemen differ in the grounds of their arguments, those on one side considering the states as districts of people composing one political society, those on the other considering them as so many political societies. The fact is that the states do exist as political societies, and a government is to be formed for them in their political capacity, as well as for the individuals composing them. Does it not seem to follow, that if the states as such are to exist they must be armed with some power of self-defence. This is the idea of Col. Mason who appears to have looked to the bottom of this matter. Besides the aristocratic and other interests,

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281 1 Records 354.
282 1 Records 366.
283 1 Records 407.

which ought to have the means of defending themselves, the states have their interests as such, and are equally entitled to like means. On the whole he thought that as in some respects the states are to be considered in their political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined; that in *one* branch the *people,* ought to be represented; in the *other,* the *states.*"[284]

But although Johnson believed that the states were entitled to representation as states in the Congress, he did not consider that, as between national and state governments, the states retained their sovereignty. This is clear from his remarks of August 20 concerning the provision relating to treason. "He contended that treason could not be both against the United States and individual states, being an offence against the sovereignty, which can be but one in the same community. Doctor Johnson was still of opinion there could be no treason against a particular state. It could not even at present, as the Confederation now stands, the sovereignty being in the Union; much less can it be under the proposed system."[285]

Johnson was a member both of the compromise committee and the committee on style. He signed the Constitution and worked for its ratification. Elected to the Senate in 1789, he resigned two years later so that he could devote full time to Columbia, where he served until 1800.

2. *Roger Sherman.* A farmer's son and a shoemaker with no formal education, Sherman was an outstanding example of a self-made and a self-educated man. By dint of hard work and common sense, he became a lawyer, a landowner, treasurer of Yale and an honorary degree recipient, and a state judge from 1766 to 1789. He was one of the most influential members of Congress during his tenure from 1774 to 1781 and again in 1783-84, during which time he tried unsuccessfully to bring about an increase in Congress' powers. He had the unique distinction of being the only man to sign all three documents — the Declaration of Independence, the Articles of Confederation, and the Constitution.

In the Convention, Sherman favored increasing the powers of the central government, but was not an advocate of sweeping changes in the direction of nationalism, and was more solicitous than most of the delegates of the powers of the states. Thus, on May 30 "Mr. Sherman who took his seat today, admitted that the Confederation had not given sufficient power to Congress and that additional powers were necessary; particularly that of raising money which he said would involve many other powers. He admitted also that the general and particular juris-

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284 1 Records 461.
285 2 Records 346.

dictions ought in no case to be concurrent. He seemed however not be disposed to make too great inroads on the existing system; intimating as one reason, that it would be wrong to lose every amendment, by inserting such as would not be agreed to by the states."[286]

On June 6 he elaborated. "If it were in view to abolish the state governments the elections ought to be by the people. If the state governments are to be continued, it is necessary in order to preserve harmony between the national and state governments, that the elections to the former should be made by the latter. The right of participating in the national government would be sufficiently secured to the people by their election of the state legislatures. The objects of the Union, he thought were few. 1. defense against foreign danger. 2. against internal disputes and a resort to force. 3. treaties with foreign nations. 4. regulating foreign commerce, and drawing revenue from it. These and perhaps a few lesser objects alone rendered a confederation of the states necessary. All other matters civil and criminal would be much better in the hands of the states. The people are more happy in small than large states. States may indeed be too small as Rhode Island and thereby be too subject to faction. Some others were perhaps too large, the powers of government not being able to pervade them. He was for giving the general government power to legislate and execute within a defined province."[287]

On June 20 he stated that "Each state like each individual had its peculiar habits, usages and manners which constituted its happiness. It would not therefore give to others a power over this happiness, any more than an individual would do so, when he could avoid it."[288] And on the same day, King records, he said "I am for an increase of the powers of Congress, and wish to preserve the state governments, and am against a consolidation or Union."[289]

Within its sphere, Sherman agreed that the national government should be supreme. On June 30 he stated that "I acknowledge there have been failures in complying with the federal requisition. Many states have been defective, and the object of our convention is to amend these defects."[290] And on July 14 "Mr. Sherman, signified that his expectation was that the general legislature would in some cases act on the federal principle of requiring quotas. But he thought it ought to be empowered to carry their own plans into execution, if the states should fail to supply their respective quotas."[291] As to the Congressional negative, Sherman "thought the cases in which the negative ought to be

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2861 Records 34.
2871 Records 133.
2881 Records 343.
2891 Records 350.
2901 Records 498.
2912 Records 11.

exercised might be defined."[292] Later, because he thought national supremacy would be recognized, he saw no need for the negative. Thus, on July 17 "Mr. Sherman thought it unnecessary, as the courts of the states would not consider as valid any law contravening the authority of the Union, and which the legislature would wish to be negatived . . . . Such a power involves a wrong principle, to wit, that a law of a state contrary to the articles of the Union, would if not negatived be valid and operative."[293] Similarly, he saw no need for a prohibition against tonnage duties by the states. On September 15: "The power of the United States to regulate trade being supreme can control interferences of the State regulations when such interferences happen; so that there is no danger to be apprehended from a concurrent jurisdiction."[294]

On the other hand, Sherman sought to protect the states against national encroachments. For this reason he supported state equality in the Senate. On June 11, advancing the basis of the later compromise, "Mr. Sherman proposed that the proportion of suffrage in the first branch should be according to the respective numbers of free inhabitants; and that in the second branch or Senate, each state should have one vote and no more. He said as the states would remain possessed of certain individual rights, each state ought to be able to protect itself, otherwise a few large states will rule the rest."[295] And on July 14 "Mr. Sherman urged the equality of votes not so much as a security for the small states as for the state governments which could not be preserved unless they were represented and had a negative in the general government."[296] He also believed that election of Senators by state legislatures was desirable for this reason. On June 7 "Mr. Sherman seconded the motion, observing that the particular states would thus become interested in supporting the national government and that a due harmony between the two governments would be maintained. He admitted that the two ought to have separate and distinct jurisdictions, but that they ought to have a mutual interest in supporting each other."[297]

In addition to such political protection, Sherman tried twice without success to insert in the Constitution a specified protection of the power of the states over their internal police. On July 17 "Mr. Sherman observed that it would be difficult to draw the line between the powers of the general legislatures and those to be left with the states; that he did not like the definition contained in the resolution, and proposed in place of the words 'of individual legislation,' line 4 inclusive, to insert 'to make laws binding on the people of the United States in all cases which may

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[292] 1 Records 166.
[293] 2 Records 27.
[294] 2 Records 625.
[295] 1 Records 196.
[296] 2 Records 5.
[297] 1 Records 150.

concern the common interests of the Union; but not to interfere with the government of the individual states in any matters of internal police which respect the government of such states only, and wherein the general welfare of the United States is not concerned,"[298] And on September 15, speaking on the amending power, "Mr. Sherman expressed his fears that three fourths of the states might be brought to do things fatal to particular states, as abolishing them altogether or depriving them of their equality in the Senate. Mr. Sherman moved according to his idea above expressed to annex to the end of the article a further provisio 'that no state shall without its consent be affected in its internal police, or deprived of its equal suffrage in the Senate.' "[299] Only the latter clause was adopted.

In accordance with his views, Sherman opposed certain particular provisions. Thus, on the requirement of an oath of state officers to observe the national Constitution and laws, "Mr. Sherman opposed it as unnecessarily intruding into the state jurisdictions."[300] And on the compensation of members of Congress, "Mr. Sherman contended for referring both the quantum and the payment of it to the state legislatures."[301]

Despite his fears, however, Sherman took an active role in supporting ratification. He later served in the House during 1789-91 and in the Senate from 1791 until his death two years later.

3. *Oliver Ellsworth.* The son of a wealthy farmer, Ellsworth was expelled from Yale, there upon went to Princeton, and eventually became a lawyer. He almost starved during three years of rural practice, but on moving to Hartford, he was immediately successful and quickly rose to wealth and power at the bar. He had served as a state's attorney, as a judge, and as a member of Congress from 1779 to 1783.

In the Convention Ellsworth was a moderate nationalist. He voted in favor of a general legislative power in Congress in all cases where the states individually were incompetent, but he contemplated that the business of Congress "would relate to a few great national objects only."[302] And yet, within this area, he had no doubt that "the laws of the United States are to be paramount."[303] Ellsworth feared and repeatedly cautioned that a constitution which was too nationalist in its design would arouse such oppostion as to defeat its adoption. Thus, on June 22 "Mr. Ellsworth. If we are jealous of the state governments they will be so of us. If on going home I tell them we gave the general government such powers because we could not trust you, will they adopt it, and with-

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298 2 Records 25.
299 2 Records 629.
300 1 Records 203.
301 1 Records 373.
302 1 Records 569.
303 2 Records 347.

out their approbation it is a nullity."[304] And on June 25: "We know that the people of the states are strongly attached to their own constitutions. If you hold up a system of general government, destructive of their constitutional rights, they will oppose it. Some are of opinion that if we cannot form a general government so as to destroy state governments, we ought at least to balance the one against the other. On the contrary, the only chance we have to support a general government is to graft it on the state governments. I want to proceed on this ground, as the safest, and I believe no other plan is practicable. In this way, and in this way only, can we rely on the confidence and support of the people."[305] Again on June 29: "Let a strong executive, a judiciary and legislative power be created, but let not too much be attempted, by which all may be lost. He was not in general a half-way man, yet he preferred doing half the good we could, rather than do nothing at all. The other half may be added, when the necessity shall be more fully experienced."[306]

Furthermore, Ellsworth considered that area and distance precluded central government to a large extent, and rendered a continuation of state governments essential. Thus, on June 25: "He urged the necessity of maintaining the existence and agency of the states. Without their co-operation it would be impossible to support a republican government over so great an extent of country. An army could scarcely render it practicable. The largest states are the worst governed. Virginia is obliged to acknowledge her incapacity to extend her government to Kentucky. Massachusetts can not keep the peace one hundred miles from her capitol and is now forming an army for its support. How long Pennsylvania may be free from a like situation can not be foreseen. If the principles and materials of our government are not adequate to the extent of these single states, how can it be imagined that they can support a single government throughout the United States. The only chance of supporting a general government lies in engrafting it on that of the individual states."[307] And on June 30: "Mr. Ellsworth. Under a national government he should participate in the national security, as remarked by Mr. King, but that was all. What he wanted was domestic happiness. The national government could not descend to the local objects on which this depended. It could not embrace objects of a general nature. He turned his eyes therefore for the preservation of his rights to the state governments. From these alone he could derive the greatest happiness he expects in this life. His happiness depends on their existence, as much as a newborn infant on its mother for nourish-

3041 Records 374.
3051 Records 414.
3061 Records 469.
3071 Records 406.

ment. If this reasoning was not satisfactory, he had nothing to add that could be so."[308]

He felt, therefore, that Senators should be chosen by the state legislatures. On June 25: "Whoever chooses the member, he will be a citizen of the state he is to represent and will feel the same spirit and act the same part whether he be appointed by the people or the legislature. Every states has its particular views and prejudices, which will find their way into the general councils, through whatever channel they may flow. Wisdom was one of the characteristics which it was in contemplation to give the second branch. Would not more of it issue from the legislatures, than from an immediate election by the people."[309] He advocated equal representation in the Senate on the ground that "We were partly national, partly federal. The proportional representation in the first branch was conformable to the national principle and would secure the large states against the small. An equality of voices was conformable to the federal principle and was necessary to secure the small states against the large. He trusted that on this middle ground a compromise would take place."[310] On the question of compensation, he originally favored payment by the states, but eventually changed his mind because "in reflecting on this subject he had been satisfied that too much dependence on the states would be produced by this mode of payment."[311] That Ellsworth seems to have contemplated a division of sovereignty is indicated by his remark made during debate on the treason provision: "The U. S. are sovereign on one side of the line dividing the jurisdictions—the States on the other—each ought to have power to defend their respective sovereignties."[312]

Ellsworth left the Convention almost a month before it ended and was not present for the signing of the Constitution. He supported ratification, however, in his well-known "Letters of a Landholder." He was elected to the Senate in 1789 where he became, in the words of John Adams, "the firmest pillar in his (Washington's) whole administration." He personally wrote most of the Judiciary Act of 1789, including the famous section 25 declaring the appellate jurisdiction of the Supreme Court over state courts. It was this section which the advocates of state sovereignty later repeatedly and vainly sought to repeal. Ellsworth was Chief Justice of the Supreme Court from 1796 to 1800.

CONCLUDING SUMMARY

On the basis of the foregoing examination of the views of the individual delegates, it is possible to make certain general and collective

308 1 Records 492.
309 1 Records 406.
310 1 Records 468.
311 2 Records 290.
312 2 Records 349.

summary conclusions. As has been noted, throughout the revolutionary and confederation periods there was a basic division of thought as to the nature of the American system of government—namely, whether there should be a strong national government possessed of authority and powers, including power of enforcement, paramount to the states, or whether there should be a weak federal government in which the central authority was limited and subordinate to the political sovereignty of the states. For brevity, these views have been summarized in the phrases "national supremacy" and "state sovereignty." On this question, there is no room for doubt that almost all of the delegates to the Constitutional Convention were personally committed to the nationalist philosophy. Some of the delegates went farther in their nationalism than did others, and these differences in degree manifested themselves in disagreement over certain specific matters such as the extent of the powers of Congress and the limitations on those powers, the amount of independence and automomy which should be left to the states, and the best method of assuring and enforcing the supremacy of national law.

Twelve of the delegates comprised what might be called the "advanced nationalists." This group included George Washington, who thought that the states to the nation should be as counties to a state, and who advocated a "radical cure" for the evils of "thirteen sovereignties pulling against each other;" James Madison, who believed the national government should have "a negative in all cases whatsoever on the legislative acts of the states" to protect national supremacy and confine the states to areas where they could be "subordinately useful;" James Wilson, who said that in forming a general government "we ought to proceed by abstracting as much as possible from the idea of state governments" and who denied that a sovereign state could retain its sovereignty within the new system; Gouverneur Morris, who declared that "State attachments and state importance have been the bane of this country" and that the happiness of America would not be affected "if all the charters and constitutions of the states were thrown into the fire, and all their demagogues into the ocean;" Alexander Hamilton, who desired "a complete sovereignty in the general government" even to the extent of nationally appointing state governors with an absolute veto over all state laws; Charles Pinckney, who thought that "The idea which has been so long and falsely entertained of each being a sovereign state, must be given up;" John Langdon, who believed the "extent of the National Constitution" should be judged by the national and not by the state governments; George Read, who said that "State attachments should be extinguished as much as possible" and who hoped "the objects of the general government would be much more numerous" than some expected and that "they would become more and more so;" and Nathaniel Gor-

ham, who thought this "it was of importance therefor that the extent of the states should be reduced as much and as fast as possible." In this group should be included also Benjamin Franklin, and on the basis of collateral evidence, Robert Morris and Jared Ingersoll. It should be noted that four of this group — Washington, Madison, Wilson and Gouverneur Morris—were among the most influential members of the Convention.

A large group of delegates, twenty-one in number, were what might be called the "moderate nationalists." These men agreed that a strong national government should be created which would be supreme over the states and equipped with some means of enforcing its supremacy. They disagreed with the "advanced nationalists" on the extent of the powers which the national government should have, on how its supremacy should be enforced against the states, and on how much power should be left to the states. In this group were John Dickinson, who "was for a strong national government but for leaving the states a considerable agency in the system," and who warned Madison against "the consequences of pushing things too far," a lesson he had no doubt learned from the fate of the Dickinson draft of the Articles of Confederation; John Rutledge, who supported national supremacy and visualized the Supreme Court as the arbiter of disputes between the national government and the states, but who wanted an enumeration of Congressional powers and who warned against creating "unnecessary obstacles" to the adoption of the new system; Charles Cotesworth Pinckney, who agreed that "the federal government cannot be made efficient" and who "wished to have a good national government and at the same time to leave a considerable share of power in the states;" Rufus King, who was astonished that some "should be ready to sacrifice . . . substantial good to the phantom of state sovereignty," who was for preserving the states in a subordinate degree," but who contemplated that "the most numerous objects of legislation belong to the states. Those of the national legislature were but few . . . ;" William Samuel Johnson, who denied that the states would retain their sovereignty under the new system, but who thought that since they would continue to "exist as political societies" they should be armed with "some power of self-defence;" Oliver Ellsworth, who recognized that "the laws of the United States are to be paramount" but thought the national government "could only embrace objects of a general nature" and who warned "Let not too much be attempted, by which all may be lost;" Roger Sherman, who "admitted the Confederation had not given sufficient power to Congress" and who denied that "a law of a state contrary to the Articles of the Union" would be "valid and operative," but who tried twice, each time in vain, to write into the Constitution a specific protection of the power of the states over their internal police: William Paterson, who insisted on equality of state

representation and forced a compromise providing for it in the Senate, but whose motives were correctly assessed by Pinckney when he said "Give New Jersey an equal vote, and she will dismiss her scruples, and concur in the national system," which Paterson thereafter did; and Hugh Williamson, who was willing to support the Congressional negative as to "such laws only as will encroach on the national government," but who believed that the "state legislatures ought to possess independent powers in cases purely local." Also included in the group of "moderate nationalists," but exercising much less influence, were James McClurg, David Brearley, Jonathan Dayton, Richard Dobbs Spaight, William Richardson Davie, Gunning Bedford, Abraham Baldwin, William Pierce, Pierce Butler, James McHenry, Daniel of St. Thomas Jenifer, and Daniel Carroll.

The three delegates who refused to sign the Constitution may also properly be included in the group of "moderate nationalists." It was not a fundamental disagreement with the basic postulates of the nationalist philosophy that prompted the decision of Randolph, Mason and Gerry, although Mason had at one time been an adherent of state sovereignty. The common denominator of their unwillingness to sign was a belief that excessive powers had been granted to the new national government without sufficient limitation. Their disagreement was on a question of degree, rather than on basic principle. Thus, while Randolph was "convinced that radical changes in the system of the Union were necessary," he gave as his reason for not signing "the indefinite and dangerous power given by the Constitution to Congress." Similarly, Mason agreed that "a more efficient government is necessary," but felt that "whatever power may be necessary for the national government a certain portion must necessarily be left in the states. . . ." It was "the dangerous power and structure of the government" which Mason saw in the powers of Congress and the jurisdiction of the United States courts which persuaded him that the nationalists had overreached themselves. And Gerry, who had started out in the Convention by complaining that "The states and the advocates for them were intoxicated with the idea of their sovereignty," ended up by warning the Convention "against pushing the experiment too far," and refusing to sign when he concluded that his warning had gone unheeded.

A third group, which might be called the "uncommitted," was comprised of the fourteen delegates who did not reveal their views during the Convention on the issue of "national supremacy" or "state sovereignty." These men were John Blair, George Wythe, William Livingston, William C. Houston, Nicholas Gilman, Thomas Mifflin, George Clymer, Thomas Fitzsimmons, Alexander Martin, Richard Bassett, Jacob Brown, William Few, William Houstoun, and Caleb Strong.

It should be noted that these are the delegates whose participation and influence in the proceedings of the Convention so far as the records show, was virtually nil. What little evidence is available would indicate that half a dozen of them—Blair, Livingston, Clymer, Fitzsimmons, Broom, and Strong—were probably "moderate nationalists," but since they did not express themselves on the matter, it is safer to list them as "uncommitted."

There remain only five delegates to compose a group dedicated to the preservation of a system of "state sovereignty" wherein the central government was the subservient creature of states which were de facto and de jure supreme. This group included John Lansing, who doubted "whether any general government equally beneficial to all can be attained," and who said he was "not authorized to accede to a system which will annihilate the state governments . . .;" Robert Yates, who wrote to his governor that the Convention was creating "a system of consolidated government" which would "deprive the state government of its most essential rights of sovereignty, and . . . place it in a dependent situation;" and Luther Martin, who contended that "the general government ought to be formed for the states, not for individuals," and would "rather see partial confederacies take place, than the plan on the table," and who said that he "would support the state government at the expense of the Union . . . ." John Francis Mercer did not defend state sovereignty during the convention and is included in this group only because of his subsequent alignment with Martin in opposing ratification of the Constitution. William Blount, who was "not in sentiment with my colleagues" and who "disliked the Constitution," is included on the assumption that the wish was father to the thought when he predicted that "we shall ultimately end not many years just be separate and distinct governments perfectly independent of each other." It should be noted that, not only were the adherents of "state sovereignty" in the Convention pitfully small in numbers, they were almost completely without influence on the proceedings. Lansing and Yates left the Convention early in July, for the stated reason that they believed state sovereignty was being destroyed, and did not return; Mercer only attended for about two weeks and participated but little in the debates, while Blount was absent for almost two months and participated in the debates not at all. Only Martin made any sustained defense of state sovereignty, and even he eventually concluded it was hopeless and left the Convention early in September.

The overall conclusion is irrefutably clear. Only a handful of delegates to the Constitutional Convention of 1787 believed in the perpetuation of a system which has been described as a compact of sovereign states, and this handful was almost completely without influence on the

proceedings. The Constitution was drafted by men who, by their own words, revealed themselves as committed to the nationalist philosophy of a strong central government, supreme over the states, and equipped with ample means to execute its increased powers and to enforce and maintain its supremacy. The vision of the Founding Fathers did not contemplate a system based on "state sovereignty."

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Student Comments

BLEISTEIN – BEFORE AND AFTER

"A picture is none the less a picture and none the less a subject of copyright that it is used for an advertisement . . . . Accordingly I am convinced that these advertisements . . . are the subject of a valid copyright."[1] Thus, a new rule in regard to copyright protection of pictorial advertising was established in the face of an impressive list of prior authority holding to the contrary. The purpose of this article is to examine those decisions leading up to the *Bleistein* case; to determine exactly what "new rule" *Bleistein* laid down, and to consider the influence this decision has had on copyright protection for advertising outside the field of pictorial illustrations.

The Constitution of the United States provides that Congress shall have the power to "promote the progress of science and useful art, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[2] It is generally conceded that the framers of the Constitution, in vesting Congress with the power to "promote the progress of science and useful arts" had in mind works of definite literary merit.[3] Accordingly, Congress, in 1790, passed the first copyright statute,[4] for "the encouragement of learning."[5] However, it was not until *Cullender v. Griffith*,[6] decided in 1873, that the federal courts had occasion to consider pictorial advertising as a valid subject of copyright. In this case, the complainant had obtained a copyright on engravings of patented billiard tables which he used for advertising purposes. In holding that the engravings were not a valid subject of copyright protection the court stated that they were not works of art, nor were they prints, lithographs or engravings which had any value aside from advertising. "It is a mere copy of what the complainant had patented as a design, and constitutes the mode in which the complainant advertises his tables."[7]

Seven years later, in *Ehret v. Pierce*,[8] the New York Courts again discussed this matter. The plaintiff, a manufacturer of paints, had copyrighted an advertisement consisting of sheets of paper with various colors attached thereto, each different, and each numbered, for the purpose of advertising his wares. The court refused to restrain the defendant from publishing similar cards on the ground that, inter alia, the plaintiff's prints were not a valid subject of copyright. "It is an advertisement and nothing more. Aside from its function as an advertisement . . . it has no value."[9]

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[1]Bleistein v. Donaldson Lithographing Co. 188 U.S. 239, 251 (1903).
[2]U.S. Const. art. I, § 8, cl. 3.
[3]Ball, Copyright and Literary Property, § 20 (1944).
[4]Act May 31, 1790, c. 15, 1 Stat. 124.
[5]The present copyright statute is 17 U.S.C. §§ 1-252 (1947). (Amended by 66 Stat. 752 (1952)).
[6]6 Fed. Cas. 104 (No. 3000) (C.C.S.D. N.Y. 1873).
[7]6 Fed. Cas. at 105.
[8]10 Fed. 553 (C.C.E.D. N.Y. 1880).
[9]10 Fed. at 554.

Advertisement, as a valid subject of copyright came to the attention of the United States Supreme Court in *Higgins v. Keuffel* in 1891.[10] The plaintiff claimed to be entitled to the exclusive use of a label containing the words "water-proof drawing ink," which was affixed to his product. The court, speaking through Mr. Justice Field, held that the constitutional provision regarding copyrights, and the statute enacted in pursuance thereto, "has reference only to writings and discoveries as are the result of intellectual labor." There was "no reasonable argument" which would grant copyright protection to "mere labels." To be entitled to a copyright, the Court said, "The article must have by itself some value as a composition, at least to the extent of serving some purpose other than mere advertisement."[11]

While the *Higgins* case was concerned with labels, and not pictorial advertising, it is important in that the language of that case was certainly broad enough to cover all fields of advertising and because, for the first time, the Supreme Court approved the "test" which the lower federal courts had used to determine whether pictorial advertisements would be afforded copyright protection.

This test again appeared in 1896 in *Mutual Advertising Co. v. Refo,*[12] where the plaintiff published and distributed pamphlets advertising certain "reliable merchants" with whom customers could do business and redeem valuable coupons found in the pamphlets. The defendant began the same practice with some material change in the method of redeeming the coupons. The court held that the pamphlets were nothing more than advertisements and were not, therefore, subject to copyright. As for the coupons, the court said that there was no infringement as the method of redemption was essentially different.

While these cases definitely established that an advertisment had to have some value extrinsic of its use as a mere advertisement, or have some definite artistic merit, it is to be noted that they did not hold that illustrative advertisement was not copyrightable *per se.* On the contrary, the rationale of these cases seems clearly to indicate that the plaintiff's advertisments would have come within the protective mantle of the copyright law if the complainants could have shown to the satisfaction of the court that the illustrations contained some artistic merit, or served some useful purpose other than mere advertisement.

It appears that the view that advertisement was uncopyrightable per se, first appeared by way of dictum in *Lamb v. Grand Rapids School Furniture Co.*[13] In that case the plaintiff procured a copyright of a catalogue containing illustrations, for advertising purposes, of their unpatented church furniture. The defendant manufactured similar furniture and advertised it in a similar catalogue. The plaintiff sued for infringement, contending that the pictures in his catalogue were proper subjects of copyright on the ground that they were works of fine art. Judge Severans rejected this argument in the following manner: "I am convinced, however, that they were not published as such, but simply for trade purposes, in the aid of their sales, and I doubt (though I do not

10 140 U.S. 428 (1891).
11 140 U.S. at 431.
12 76 Fed. 961 (C.C.D. S.C. 1896).
13 39 Fed. 474 (C.C.W.D. Mich. 1889).

decide) whether they can be regarded in any other light."[14]

Just what Judge Severans meant by his decision is not entirely clear. If he meant that there was much doubt whether the engravings were intrinsically valuable as works of art, his decision rested upon firm ground. However, if he was suggesting that once a picture was used for the purpose of advertisement, the owner was estopped from pleading that they were works of fine art, the decision was unsound both in reason and prior authority.[15]

However, *Mott Iron Works v. Clow*[16] also seems to indicate that advertisement was, per se, not a subject of copyright. In the case the plaintiffs were manufacturers of bathtubs, sinks, etc., and had issued, from time to time, advertising sheets containing illustrations of their products. It was admitted by demurrer that the defendant had substantially copied the plaintiff's advertisement and would be guilty of infringement if the advertisements were a valid subject of copyright. Sustaining the defendant's demurrer, the court stated:

> "The cuts or prints shown in the complainants' sheets . . . may have such artistic merit as would support a copyright if offered as a work of fine art . . . . But the bill does not show that the author or designer intended or contemplated these cuts and prints as works of fine art. No copyright was asked upon them separately from the advertising sheet of which they are a part."[17]

Thus, the court refused to grant copyright protection to the plaintiffs' catalogue, not because it lacked asthetic qualities, but merely on the ground that it was used for advertisement; the end result being that illustrative advertisement was per se uncopyrightable. The reasoning of the District Court was short lived, for while the Circuit Court of Appeals affirmed the District Court's decision, they seemed to have rejected, *sub silentio,* the reasoning upon which the opinion was based, accepting in lieu thereof, the rule which had been laid down in *Higgins v. Keuffel.*[18]

Until this decision, those courts refusing copyright protection for pictorial advertising had been content to state the generally accepted rule without making any attempt to explain to what extent the subject in controversy would have to serve some purpose other than mere advertisement in order to come within the statute. The Circuit Court of Appeals now attempted to fill in the gap which prior decisions had left open.

"It is possibly not beyond comprehension that pictures . . . though intended mainly for advertisement may, in localities where such conveniences are not in common use, be the means of instruction and of advancement in knowledge of the arts, and, when they are the product of original, intellectual thought, may possibly come within the scope of

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[14]39 Fed. at 475.

[15]Prior to Lamb v. Grand Rapids School, there had been at least two cases which had held pictorial advertisement a valid subject of copyright.

[16]72 Fed. 168 (N.D. Ill. 1896).

[17]72 Fed. at 169.

[18]Mott Iron Works v. Clow, 82 Fed. 316, 318 (7th Cir. 1897); ". . . to be entitled to a copyright, the article must have, by and of itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement."

the constitutional provision."[19]

Even though there are scattered decisions which would seem to indicate that pictorial advertisement could not be a valid subject of copyright regardless of its extrinsic merit, this view never gained any real foothold in this country. At the same time the burden which illustrated advertisement was required to meet in order to be brought within the statute, was indeed formidable as the *Mott* case indicated.

At least two cases, however, had met this burden and were accordingly held to be within the protection of the copyright statute. The first of these was *Yuengling v. Schile*,[20] a case decided by the same court which had rendered the decision in *Cullender v. Griffith* nine years previously. The plaintiff had allegedly copyrighted a chromo entitled "Gambrinus and his Followers," which was used as a beer advertisement. The chromo depicted King Gambrinus[21] holding a glass of lager beer in one hand and resting his other arm on a keg of the brew, while all around him were his "subjects" (who represented all classes of people), receiving a portion of the drink from Gambrinus' beer. Though copyright protection was refused on other grounds,[22] the court held that the picture was a valid subject of copyright protection "without regard to the use which the plaintiff has made or may intend to make of it."[23] The court distinguished its earlier decision in the *Cullender* case on the ground that here the chromo was definitely a work of imagination and had "such obvious artistic qualities"[24] as to render it a subject of copyright.

The second case holding commercial art to be copyrightable appeared three years later in *Schumacher v. Schwencke*.[25] The advertisement in question consisted of a picture of a newsboy with newspapers on his shoulder and the burnt end of a cigar in his mouth. While there was evidence that the lithograph would be used as a label for cigar boxes, it was not shown that this was to be the sole purpose for which it would be used. The fact that copies may be utilized for advertising purposes, the court said, did not change the character of the original picture. If this were not so, "no masterpiece would escape such desecration."[26] Thus, since the original had definite artistic merit, it could be copyrighted.

Though the defendant was enjoined from further infringement, it is interesting to note, that the court indicated that if there had been a showing that the picture was intended exclusively as an advertisement, "a much stronger case for defendants would be presented."[27] This language leads one to believe that the court was of the opinion that pictures used exclusively for advertising purposes were uncopyrightable per se.

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19 82 Fed. at 321.

20 12 Fed. 97 (C.C.S.D. N.Y. 1882).

21 Legend has it that Gambrinus, while King of Flanders, invented lager beer, and first used it as a potion or draught.

22 The plaintiff, not being the "author or inventor" of the picture in question failed to show that he had derived legal title from the author, and copyright was, therefore, denied.

23 12 Fed. at 100.

24 Ibid.

25 25 Fed. 466 (C.C.S.D. N.Y. 1885).

26 25 Fed. at 467.

27 Ibid.

The stage was set for the Supreme Court's now famous decision in *Bleistein v. Donaldson Lithographing Co.*[28] The pictures involved were ordinary circus posters, portraying a group of men and women performing on bicycles, and a group of persons whitened to represent statues. When the case had been tried in the circuit court of appeals three years previously it was held that the posters could not be copyrighted, as they served no useful purpose other than that of advertisement.[29] There is no question that the court's opinion, based on prior decisions, was correctly decided.[30] Thus, when the case came before the Supreme Court on writ of error, two distinct lines of authority[31] had been established, either of which would have supported a finding that the posters in question were not a proper subject of copyright under the then existing law.

Plaintiffs in error recognized the generally accepted rule of the *Higgins* case, but contended that the measuring rod of artistic merit and value should not be left solely within the court's discretion. On the contrary, they argued, if the article had enough merit and value to be the object of piracy, it would be of sufficient artistic merit to be entitled to protection, "Certainly it does not lie in the mouth of the pirate, who has stolen and copied them at some expense and considerable risk to deny that they have merit and value."[32] The degree of merit of the copyrighted matter should be left to the public, they contended. As far as the law was concerned, "Any is legally enough. To use it, or not use it, is voluntary on the part of the public."

The Supreme Court, speaking through Mr. Justice Holmes accepted this argument, thereby giving birth to a new era in the field of copyright law.[33]

> "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation . . . . At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge. Yet if they command the interest of any public, they have a commercial value—it would be bold to say that they have not an aesthetic and educational value—and the taste of any public is not to be treated with contempt."[34]

A new rule had been promulgated: the Supreme Court had spoken; the march was on and case after case allowed copyright protection to pictorial advertisement. The first case decision to follow the *Bleistein*

28188 U.S. 239 (1903).

29Courier Lithographing Co. v. Donaldson Lithographing Co., 194 Fed. 993 (6th Cir. 1900).

30"What we hold is this: that if a chromo, lithograph . . . or picture has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the useful arts, within the meaning of the constitutional provision . . . and the copyright statute should not be construed as including such a publication, if any other construction is admissible." 104 Fed. at 996.

31 (1) The majority rule as laid down in Higgins v. Keuffel or (2) the view that pictorial advertisement was, per se, not a valid subject of copyright.

32188 U.S. at 243-244.

33121 Fed. 71 (8th Cir. 1903).

34188 U.S. at 251.

decision was *Cleland v. Thayer*,[35] in which the plaintiff had copyrighted some photographs of natural scenery in Colorado and sold them for profit. Without discussing the artistic merit of the picture the court stated that the opinion in the *Bleistein* case, which had been handed down since this controversy had arisen,[36] brought such pictures within the protection of the copyright law.

A catalogue which advertised statuaries and other articles of church furniture was held to be subject of copyright in *Da Prato Statuary Co. v. Giuliani Co.*[37] *Lamb v. Grand Rapids School Furniture*[38] was distinguished on the ground that in the *Lamb* case, the defendant's prints, which also dealt with church decorations, were copies of their own stock and were not copies of the plaintiff's copyrighted prints. However, in distinguishing this decision, the court completely ignored the fact that the *Lamb* case had also intimated that those pictures would not have been copyrightable in any event because they lacked the requisite artistic merit necessary to entitle them to protection, a factor completely irrelevant after the *Bleistein* case. Thus, it would seem that while the court attempted to distinguish the case, it was, in fact, overruled.

In *National Cloak & Suit Co. v. Kaufman*,[39] it was held that a periodical publication, consisting of the latest in ladies' fashions was a valid subject for protection under the copyright statute. The court, while recognizing that the constitutional provision was for the promotion of science and useful arts, was of the opinion that it "no doubt should be liberally construed to give effect to its terms and true intent."[40] In following the *Bleistein* case, the court could "see no reason why copyright should be withheld from complainant's pictures. . . ."

Though the *Bleistein* case was followed subsequent to 1903, it would appear that it was not until 1915 that the full import of the decision was recognized. Prior to this time, it had been the tendency of the courts to attempt to explain away rather than to overrule earlier decisions. However, in *J. H. White Mfg. Co. v. Shapiro*[41] the court made no such attempt.[42] The court, in sustaining the validity of the plaintiff's copyright, considered two earlier cases[43] which had held similar subjects uncopyrightable as overruled. Speaking of these cases, the court said: "These decisions certainly are not without much basis in reason; but I cannot see that the distinction made by them in respect to catalogues for advertising is warranted by the strict language of the statute, and the case of *Bleistein v. Donaldson Lithographing Co. . . .*"[44]

35121 Fed. 71 (8th Cir. 1903).

36The circuit court for the district of Colorado had sustained a demurrer to plaintiff's bill prior to the Bleistein opinion.

37189 Fed. 90 (D.C. Minn. 1911).

38See Note 13 supra. Four years later this case was to be considered as having been overruled by the Bleistein case.

39189 Fed. 215 (M.D. Penn. 1911).

40189 Fed. at 218.

41227 Fed. 957 (S.D. N.Y. 1915).

42Plaintiff had obtained a copyright on its catalogue of brass goods consisting of trimmings for electric light fixtures. The principal question in the case was whether the catalogue could be copyrighted.

43Lamb v. Grand Rapids School Furniture Co., note 13 supra, and Mott Iron Works v. Clow, note 18 supra.

44227 Fed. at 958.

Freed of the sometimes difficult task of distinguishing the earlier cases, the courts continued to hold illustrative advertisment a valid subject of copyright. Thus, in *Stecher Lithograph Co. v. Dunston Lithograph Co.*[45] the defendants were enjoined from infringing plaintiff's copyright of certain chromos of vegetable products. The fact that the pictures were to be used for advertising articles of commerce or that they possessed little artistic merit was, in the court's opinion, unimportant. "It is enough that the evidence shows that the pictures in their details, designs and combinations of lines and colors originated with the complainants. . . ."[46] In *Campbell v. Wireback*[47] the court, in passing upon the question of whether illustrative advertisement could be copyrighted, stated that the contention that such articles are outside the protection of the statute "is refuted by abundant authority."[48]

Again, in 1938, the question arose, this time in the case of *Burndy Engineering Co. Inc. v. Penn-Union Electric Corp.*[49] In rejecting defendant's contention that the subject matter (trade catalogues containing illustrations of electrical conductors and connectors) was not a valid subject of copyright because it was not connected with the fine arts, the court said:

"The Supreme Court held in *Bleistein v. Donaldson Lithographing Co.* . . . . that the words in the statute, 'connected with the fine arts,' . . . . applies only to and limited the word 'works' and had no limitation on the words 'print, cuts and engraving' contained in the copyright statute."[50]

Though it would appear that the matter had been laid to rest, it again reared its head as late as 1954 in *Laskowitz v. Marie Designer, Inc.*[51] In this case, the plaintiff manufacturing company was the owner of a patent for an ornamental design for a chair. Defendants were granted the exclusive distributing rights to the chair and by contract the parties agreed to jointly advertise the product. The defendant took out a copyright upon the advertisement which consisted of a picture of the chair, with a label reading: "This is nature's most relaxing pause." After the contract was terminated the plaintiffs sued for infringement of their patent, and the defendants counterclaimed for infringement of their copyright on the advertising material. Though the court disposed of the counterclaim on other grounds, they summarily dismissed the question

45233 Fed. 601 (W.D. N.Y. 1916).
46233 Fed. at 603.
47269 Fed. 372 (4th Cir. 1920).
48269 Fed. at 374.
4925 F. Supp. 507 (W.D. Penn. 1938).
5025 F. Supp. at 509. Act of June 18, 1874, c. 301, § 3, 18 Stat. 79, to which the court refers, provided: "That in the construction of this act, the words 'Engraving,' 'cuts' and 'prints' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints, or labels designed to be used for any other article of manufacture shall be entered under the copyright law, but may be registered in the Patent Office." This section was, however, repealed by 17 U.S.C.A. § 6 which states: "Commencing July 1, 1940, the Register of Copyrights is charged with the registration of claims to copyright properly presented, in all prints and labels published in connection with the sale or advertisement of articles of merchandise, including all claims to copyright in prints and labels pending in the Patent Office and uncleared at the close of business June 30, 1940 . . . ."
51119 F. Supp. 541 (S.D. Cal. 1954).

of whether the pictorial advertising was a valid subject of copyright, stating simply that "advertisement, whether in the form of words or pictorial illustrations may be made the subject of copyright despite the absence of any high artistic or literary merit."[52]

Since *Bleistein,* there has been but one case in which pictorial advertising has been refused copyright protection on the ground that it was not of sufficient artistic merit, and it would appear that this case has been completely abandoned.[53] It seems, therefore, that the "new rule" promulgated by *Bleistein v. Donaldson Lithographing Co.* provides that once it is established that the picture meets the minimum requirements of originality necessary to obtain a copyright,[54] artistic merit will be conclusively presumed, and the fact that the picture has no useful function outside the realm of advertisement will be of no import. Thus, the question of whether a picture is the subject of copyright now turns upon originality and not artistic merit.

It has been suggested that the underlying reason for the much broader degree of protection afforded pictorial advertisement was a realization that, by 1903, commercial art had become big business,[55] millions of dollars being spent each year for this method of advertising,[56] and a belief on the part of the courts that in no other way could man's labor in this field be adequately protected.[57]

As the test of copyrightability of pictorial advertisement now depends entirely upon whether the material is original, it would seem that copyright protection for written advertisement in the form of labels should be accorded the same degree of protection, and for a while, it seemed that this would be the case.[58] The first hint that labels would be treated differently from pictorial advertisement came in *Fargo Mercantile Co. v. Bricket & Richter Co.*[59] The controversy arose over the plaintiff's labels which contained the plaintiff's name and other advertising matter. While the court enjoined further infringement on the ground that the labels were original compositions which "serve a useful purpose apart from mere advertisement of the article itself," it was doubled whether a label which was "mere advertisement" was copyrightable.

In *Bobrecker v. Denebeim*[60] the plaintiff, a distributor of whiskey, had obtained from a lithographing company a standard type label containing both pictorial illustrations and text material. It was held that

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[52]119 F. Supp. at 551. See also Ansehl v. Puritan Pharmaceutical Co., 61 F.2d 131, (8th Cir. 1932); Deward & Rich Inc. v Bristol Savings & Loan Corporation, 29 F. Supp. 777 (W.D. Vir. 1939); Gordon v. Weir, 111 F. Supp. 117 (E.D. Mich. 1953).

[53]Royal Sales v. Gaynor, 164 Fed. 207 (S.D. N.Y. 1908). This case was criticized and ignored in King Features v. Fleischer, 299 Fed. 533, 537 (2nd Cir. 1924).

[54]It is well settled that any material, in order to be made the subject of copyright must be original. See Jones Bros. Co. v. Under-Doffler, 16 F. Supp. 729 (M.D. Pa. 1936); Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2d Cir. 1951).

[55]Freeland, Copyright Protection for Advertising, 27 Ky. L.J. 391 (1939); Comment, 16 Notre Dame Lawyer 298 (1941); Comment, 3 5Ky. L.J. 205 (1947).

[56]In Laskowitz v. Marie Designer Inc., 119 F. Supp. 541 (S.D. Cal. 1954), it was pointed out that some $800,000 was spent in national advertising, by one company for one line of chair.

[57]See Ball, Copyright and Literary Property § 20 (1944).

[58]See No-Leak-O Piston Ring Co. v. Norris, 277 Fed. 951 (4th Cir. 1921); Ansehl v. Puritan Pharmaceutical Co., 61 F.2d 131 (8th Cir. 1932).

[59]295 Fed. 823 (8th Cir. 1924).

[60]28 F. Supp. 383 (W.D. Mo. 1939).

the plaintiff was not entitled to a copyright as the label "was nothing original . . . nor was it pretended that it was original." If the court had stopped here, there could be little ground for arguing that the case was incorrectly decided, as originality is clearly a prerequisite to obtaining a copyright.[61] The court continued, however, stating that the textual part of a label, "as a matter of art, is only a part of the copyright when it aids or augments the pictorial illustration. . . . This was aptly covered in *Higgins v. Keuffel* . . . where the court said . . . 'To be entitled to a copyright the article must have by itself some value as a composition at least to the extent of serving some purpose other than a mere advertisement or designation of the subject to which it is attached.' "[62]

Then, citing with approval from *Corpus Juris,* the court stated that under the existing statute, no label, even though possessed of artistic merit could be copyrighted if it was designed to be used for any article of manufacture.[63] The court apparently based its conclusion on the fact that the copyright statute then provided that any print or label which was designed to be used for articles of manufacture should not be copyrighted, but "may be registered in the Patent Office."[64] Thus, it would appear that the court's opinion was somewhat contradictory, for *Higgins v. Keuffel* did not hold that labels were not a subject of copyright because of the statute, but on the contrary, clearly indicated that a label which met the test laid down would come within the statute's protection. If, on the other hand, the court meant that labels were *per se* uncopyrightable, then the language harks back to *Mott Iron Works v. Clow* and the pre-*Bleistein* era, but it is still contradictory to the general principles of the *Higgins* case.

That a different test would be used in determining the degree of protection granted to labels from that given pictorial advertisement became clear in *Griesedieck Western Brewery v. People Brewing Co.*[65] In that case, the plaintiff had copyrighted a label containing the words "Stag Beer" in large letters and "Extra Dry Pilsener Beer" in smaller letters. In the center of the label appeared a picture of the head of a deer. The court, in discussing the label in question found itself with the seemingly contradictory Supreme Court cases of *Bleistein* on one hand and *Higgins v. Keuffel* on the other. The court, in rendering its opinion attempted to reconcile these decisions: "Tested by these standards (*Higgins and Bleistein),* the picture of the animal's head on the plaintiff's label is copyrightable and entitled to protection."[66] Turning to the written portion of the label, the court relied on the *Higgins* case and held that the words appearing on the label could not be copyrighted, for the "textual part of a label is eligible for copyright registration as a matter of art only when it aids or augments the pictorial illustration. . . ."[67] The result of the case was, therefore, that part of the plaintiff's label was copyrightable, but the other part was not!

61Note 54 supra.
6228 F. Supp. at 384.
6313 C. J. Copyright and Literary Property, § 141.
64Note 50 Supra.
6556 F. Supp. 600 (D.C. Minn. 1944).
6656 F. Supp. at 606.
67Ibid.

Six years later, the question of whether a "mere label" could be copyrighted was again before the court.[68] In denying copyright protection to the plaintiff, the *Griesedieck Western Brewery* case was cited with approval, the court stating that "there is certainly nothing artistic about the way in which plaintiff's name . . . appears on the copyright label . . . . I must conclude, therefore, (that) . . . those registrations are not valid under the copyright statute."[69] The rationale of these two cases clearly indicates that the liberal rule laid down in the *Bleistein* case has not carried over into the field of written advertisement in the form of labels, though today there seems to be little, if any, ground for affording a different degree of protection for these two situations. On the contrary, these seem to be several valid arguments which could be presented which would favor the same test in both cases.

First, in *Schumacher v. Wagram*,[70] the plaintiffs were manufacturers of prints and labels, selling them for the purpose of being affixed to cigar boxes. They copyrighted a picture, entitled "Nosegay" which depicted a woman holding a bouquet of flowers. It was later sold to dealers in cigars, the words "Opera Bouquet" (a name descriptive of a brand of cigar) being substituted in place of the word "Nosegay." In an action to restrain further infringement, an injunction was denied, on the ground that under the copyright law[71] no prints or labels designed to be used for any article of manufacture could be copyrighted, but must be registered and protected as trademarks in proper cases. "If the experiment of the plaintiffs can succeed, this statute is inoperative whenever the prints or labels contain a pictorial illustration; and it could be wholly nullified by the device of printing pictures on labels."[72] Clearly, the court refused to grant copyright protection to the label in question because of a distinction found in the statute between pictorial illustrations and "prints or labels." However, while it was once true that the copyright statute treated prints or labels differently from pictorial illustrations, the new statute which was enacted in 1939[73] abolished this distinction so far as the statutory law is concerned.[74] Thus, it would not be unreasonable for the courts to hold that, as the statute has abolished all distinction between these two types of advertisement, the courts should also abolish any difference in the degree of protection which is afforded. Thus far, the courts have failed to recognize any such argument, the statutory change being almost completely ignored, as the *Griesedieck* case indicates.

Second, prior to the new act passed in 1939, there was no mention of any type of advertisement as being a valid subject of copyright, but the statute now provides that "prints or labels used for articles of merchan-

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[68]Forstmann Woolen Co. v. J. W. Mays Inc., 89 F. Supp. 964 (E.D. N.Y. 1959). Plaintiff corporation had copyrighted the name "Forstman Woolens," which name appeared on labels attached to wearing apparel.

[69]89 F. Supp. at 971. But Laskowitz v. Marie Designer, 119 F. Supp. 541, 551 (S.D. Calif. 1954) where the court stated: "Advertisement, whether in the form of words or pictorial illustrations may be made the subject of copyright despite the absence of any high artistic or literary merit."

[70]35 Fed. 210 (C.C. S.D. N.Y. 1888).

[71]Note 50 supra.

[72]35 Fed. at 211.

[73]17 U.S.C.A. §§ 1-215.

[74]Note 50 supra.

dise"[75] are a proper subject of protection. No mention is made of pictorial advertisement, possibly because this was well settled by the *Bleistein* case. However, it could be inferred that Congress, in providing that prints or labels are a valid subject of copyright, intended that this phase of advertising should be afforded the same degree of protection as that given to pictorial illustrations.

A third argument in favor of the application of the same test in both situations arises out of the fact that *Higgins v. Keuffel,* a case dealing entirely with labels, was, for many years, cited as authority for denying copyright protection to illustrative advertisement. But, since the *Higgins* rule has been abandoned in cases concerning pictorial advertisement (apparently because it was felt that such a rule worked an unjust hardship on persons who had adopted this method of advertisement), the rule should also be abandoned in cases concerning written advertisements in the form of labels.

The Supreme Court has not had occasion to pass upon the copyrightability of "labels" since *Higgins v. Keuffel.* Whether this will be followed or completely abandoned if and when the question is again presented to the court, no one can say, though it is the opinion of this writer that there is no logical reason why pictorial advertisement should enjoy a preferred position over labels. All advertisement, whether it be in the form of attractive pictures, or attractive labels, has, in the final analysis, only one real purpose—to create a public desire to purchase a certain product. Certainly just as many people rely on labels as on pictorial advertisement when they choose any named product. If this be so, then surely the underlying public policy[76] which dictated the *Bleistein* decision should likewise lay the foundation for the erection of the same broad protection for advertisement in the labels field.

It is a "dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial advertisement."[77] Is it not just as dangerous for these same men to constitute themselves final judges of the worth of written advertisement?

Newt P. Harrison

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[75]17 U.S.C.A. § 6 provides; "The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: . . . (k) Prints and pictorial illustrations including prints or labels used for articles of merchandise."

Previously, subsection (k) read; "Prints and pictorial illustrations."

[76]Note 55 supra.

[77]188 U.S. at 251.

RECENT DECISIONS

Constitutional Law — "Lady Chatterly's Lover" Death to Motion Picture Censorship?

Application for a license to distribute the film, "Lady Chatterley's Lover," [1] based on the controversial novel by D. H. Lawrence, was denied the Kingsley International Pictures Corporation by the Board of Regents of the University of the State of New York on the authority of the New York licensing statute.[2] The New York Court of Appeals affirmed the decision of the Regents in a four to three dedcision.[3] Held: Reversed. Denial of license to distributor for a film which presented adultery as being right and desirable for certain people under certain circumstances, violated the freedom of speech and press guarantees of the First Amendment to the Federal Constitution. *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*,[79] Sup. Ct. 1362 (1959).

Since 1915 when the first of the state motion picture censorship statutes came before the Supreme Court in the famous *Mutual* case,[4] the law with respect to regulation of the movie industry has undergone a complete reversal in one respect. Justice McKenna, in upholding the Ohio censorship statute,[5] said in that case: "It cannot be put out of mind that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the country or as organs of public opinion."[6] For more than thirty years the unrealistic doctrine of the *Mutual* case re-

[1]The film is concerned with an impotent British nobleman who encourages his wife to enter into an adulterous relationship with some man of her own choosing in order to obtain an heir to the family title. Lady Chatterly chooses her husband's gamekeeper and subsequently falls in love with him, but the Lord refuses to grant her a divorce.

[2]N.Y. Educ. Law §§ 122 and 122-a (Supp. 1958). Section 122, licenses: ". . . unless such film or a part thereof is obscene indecent, immoral, inhuman, sacreligious, or is of such a character that its exhibition would tend to corrupt morals or incite to crime, shall issue a license therefor." Section 122-a, which was enacted in an attempt to provide a more specific standard in view of the Supreme Court's refusal in Commercial Pictures Corp. v. Regents of the Univ., 346 U.S. 587 (1954) to allow the banning of a film on the grounds that it was "immoral" and "would tend to corrupt morals," reads in part: "1 . . . . the term 'immoral' and the 'phrase of such a character that its exhibition would tend to corrupt morals' shall denote a motion picture film or part thereof, the dominant purpose or affect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion or lewdness, *or which expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior.*" (Emphasis added).

[3]Kingsley Int'l Pictures Corp. v. Regents of University of N.Y., 4 N.Y.2d 349, 175 N.Y.S.2d 39 (1958), probable jurisdiction noted 358 U.S. 897 (1958).

[4]Mutual Film Corporation v. Ohio Industrial Commission, 236 U.S. 230 (1915).

[5]Ohio Rev. Code Ann. §§ 3305.01-.08 (1953).

[6]236 U. S. 230, 244 (1915). The Mutual case was decided before the First Amendment guarantees were extended to apply to the states by the due process clause of the Fourteenth Amendment. Ten years later in Gitlow v. New York, 268 U. S. 652 (1925) the Supreme Court said: " . . .we may and do assume that freedom of speech and of the press--which are protected by the First Amendment from abridgment by Congress--are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states."

mained the law.[7] But in 1948 the Court, through dictum in an opinion primarily concerned with an anti-trust question, hinted that the doctrine might soon be discredited.[8] In 1952 that dictum became law in *Joseph Burstyn, Inc. v. Wilson*,[9] in which the Supreme Court unequivocally overruled the *Mutual* case. The Court expressly limited its decision to the facts of the particular case and refused to decide "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of *obscene* films."[10] (Emphasis added). However, no Supreme Court decision since the *Burstyn* case has upheld a ban on a motion picture. During the period following that decision, until the opinion in the principal case was handed down, the Court consistently refused to recognize any case involving motion picture censorship with more than a per curiam or memorandum decision.[11] After one such decision involving the New York statute[12] the New York legislature set about to amend its statute to comply therewith. A definite statement of the meaning of the term "immoral motion picture" was set down in Section 122-a of the State Education Law as one which portrays "acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior."[13] It is the language in this amendment which the Court in the present case has declared unconstitutional. It was found repugnant because it requires neither "obscenity" nor "incitement to sexual immorality," but rather strikes of its own force at the advocacy of an idea—that adultery under certain circumstances may be proper behavior.[14] The decision of the Court was unanimous. Still, six of the justices, in addition to Mr. Justice Stewart who wrote the majority opinion, felt it necessary to add supplementary or qualifying opinions of their own. At least two of them would have held the statute unconstitutional on the grounds of excessive prior restraint.[15] Another would have found the language unconstitutionally vague.[16] Three others disagreed that the statute was

[7]Some decisions in which the Mutual case was cited as authority are: Mutual Film Corporation v. City of Chicago, 224 Fed. 101 (7th Cir. 1915); Eureka Productions v. Lehman, 17 F. Supp. 259 (E.D.N.Y. 1936); Fox Film Corporation v. Trumbull, 7 F.2d 715 (D.C. Conn. 1925); Foy Productions v. Graves, 253 App. Div. 475, 3 N.Y.S.2d 573 (1938), *aff'd.* 278 N.Y. 498, 15 N.E.2d 435 (1938); United Artists Corporation v. Thompson, 339 Ill. 595, 171 N.E. 742 (1930); Pathe Exchange v. Cobb, 202 App. Div. 450, 195 N.Y. Supp. 661 (1922), *aff'd.* 236 N.Y. 539, 152 N.E. 274 (1923); Mutual Film Corporation v. Breitinger, 250 Pa. 225, 95 Atl. 433 (1915). See also 17 U. Pitt. L. Rev. 637, n. 9.

[8]United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948).

[9]343 U.S. 495 (1952) *reversing* 303 N.Y. 242, 101 N.E.2d 665 (1952). The Court stated that: " . . .expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that language in the opinion in Mutual Film Corp. v. Ohio Industrial Commission is out of harmony with the views here set forth, we no longer adhere to it."

[10]Id. at 505-506. Clearly, the protection of freedom of speech embodied in the Federal Constitution does not impose an absolute limitation upon the power of the states to regulate communication. For example, see Roth v. United States 354 U.S. 476, 484 n. 14 (1957), in which it was held that obsecenity is not "speech" within the meaning of the First Amendment.

[11]Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1955); Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954); Gelling v. Texas, 343 U.S. 960 (1952).

[12]Commercial Pictures Corp. v. Regents of the Univ., 346 U.S. 587 (1954).

[13]Cf. in the text accompanying note 2 supra.

[14]79 Sup. Ct. at page 1375. Mr. Justice Harlan (concurring).

[15]Justices Black and Douglas, 79 Sup. Ct. at page 1375, citing Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, (1930).

[16]Justice Clark, 79 Sup. Ct. 1371.

unconstitutional on its face, but would merely have found its application to this particular film unconstitutional.[17] Before the instant case went to the Supreme Court it was said that the state of the law on movie censorship was nebulous and unsettled.[18] To say now that it is more so is perhaps unkind, but probably true.

At least one immediate implication of the decision can be recognized. With the demise of the New York statute, only three states remain actively engaged in censoring motion pictures: Maryland, Virginia and Kansas.[19] An examination of the language in the censorship statutes of these states results in an almost unavoidable conclusion that the Supreme Court, given the opportunity, would invalidate all of them, either on the strength of the instant case or the *Burstyn* decision.[20] Consequently, though the Court has consistently refused to hold all precensorship by the states unconstitutional, it has, in effect, done just that. Of course, theoretically, a state legislature could pass a "clearly drawn" unambiguous censorship act within the limits established by the Supreme Court. The staggering problem remains, however, of determining just what those limits are. The Court still holds the door open for regulation of obscenity and incitement,[21] but until those terms are more adequately defined by the Court itself, efforts at censorship legislation seem futile.

John Harvey Whitworth, Jr.

INCOME TAXATION — COMMUTING EXPENSES FROM TAXPAYER'S RESIDENCE TO HIS PLACE OF EMPLOYMENT AS DEDUCTIBLE FROM GROSS INCOME

The taxpayer was engaged in the occupation of felling trees at various log sites or layouts and cutting the trees into logs. He lived in a city located near the log sites and daily traveled to these sites in his automobile or jeep. There were no living accommodations available at any of the log sites. When the taxpayer's tools were in need of repair or replacement, he used his own transportation to transport the tools from the log sites to the city. No pubic transportation was available to the sites, and no transportation was provided by any of the companies for which the taxpayer worked. The taxpayer asked for a redetermination of deficiencies assessed against him by the Commissioner. The Tax Court rendered a decision adverse to the taxpayer, who then filed a petition for review. HELD: Reversed. Where the work of the taxpayer is temporary as distinguished from indefinite, his commuting expenses from his resi-

17Justices Harlan, Frankfurter and Whittaker, 79 Sup. Ct. at page 1372.

1859 Colum. L. Rev. 337, 351 (1959).

1971 Harv. L. Rev. 326, 328 (1957). Determining the numbers of cities with censorship is difficult; once estimated to be as high as ninety, the number has now declined to probably less than twenty.

20Md. Ann. Code art. 66a § 6 (Supp. 1956); Va. Code Ann. § 2-105 (1950); Kan Gen. Stat. Ann. § 51-1-2 (1949). The Miss. Code Ann. (1942) contains a typical *subsequent punishment* provision in § 2286 for the showing of "obscene, indecent or immoral" pictures, but makes no mention of *prior* censorship. In Anderson v. Hattiesburg, 131 Miss. 216, 94 So. 163 (1922), the Mississippi Supreme Court construes the statute corresponding to that section.

2179 Sup. Ct. at page 1375, Mr. Justice Harlan (concurring).

dence to his place of employment are deductible for income tax purposes, and are not non-deductible "personal, living, or family expenses" within the meaning of the Internal Revenue Code. *Crowther v. Commissioner*, 269 F.2d 292 (9th Cir. 1959).

Traveling expenses while away from home solely in the pursuit of a trade or business are allowed as a business expense deduction in the code section dealing with this subject.[1] In conjunction with Section 162 (a) (2) one must also look to the provisions of the Code pertaining to depreciation.[2] Property used in a trade or business or held for the production of income is depreciable based on its ordinary wear and tear.[3] Generally no deductions are allowed for personal, living, or family expenses.[4] Expenses incurred in traveling away from home are not deductible unless they qualify as expenses deductible under Section 162. The taxpayer's costs of commuting to his place of business or employment are personal expenses, as are the costs of the taxpayer's lodging not incurred in traveling away from home.[5] For income tax purposes a corporation is regarded entirely as a business enterprise, and all of its activities are deemed to take place in a business setting. On the other hand an individual, by contrast, is not regarded solely as a business entity whose function consists only of profit seeking activities. An individual is instead regarded for tax purposes as having two personalities: one is a seeker after profit who can deduct the expenses incurred in the search of profits, and the other is a person satisfying his needs as a human and those of his family, but who cannot deduct personal expenditures. Since the individual remains one individual, where is the dividing line? In *Commissioner v. Flowers*,[6] an attorney having offices in Mobile, Ala-

[1]Int. Rev. Code of 1954, § 162 (a) (2).

[2]Int. Rev. Code of 1954, § 167 (a). "General Rule — There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) — (1) of property used in the trade or business, or (2) of property held for the production of income."

[3]Treas. Reg. § 1.162-1 (1958).

[4]Int. Rev. Code of 1954, § 262.

[5]Treas. Reg. § 1.262-1 (b) (5) (1958). 2 P-H 1959 Fed. Tax Serv. ¶ 11367 defines "travel while away from home" as being away from the general area of one's "tax home" overnight. One need not be away from his "tax home" for an entire 24-hour day or throughout the hours from dusk to dawn as long as the relief from duty during the absence is to obtain necessary sleep, and not merely to rest or obtain a meal. The Tax Court and other courts do not agree with the Revenue Service with respect to the requirement that the trip must be an overnight one. The automobile expenses of a doctor who was employed by a hospital to visit patients all over a county were deductible where the doctor did not spend the night. Lang v. U.S., 134 F. Supp. 214 (N.D. Ga. 1955). In Scott v. Kelm, 110 F. Supp. 819 (D. Minn. 1953) the taxpayer was in a travel status away from home when as part of his duties as manager of a department of a wholesale grocery business he was required to travel to cities other than that of his regular place of employment on which trips he returned home the same day. His traveling and lodging expenses were held to be deductible. See also Chandler v. Commissioner, 226 F.2d 567 (1st Cir. 1955), Frank Fischer, 24 T.C. 269 (1955), Horace E. Podems, 24 T.C. 21 (1955), Kenneth Waters, 12 T.C. 414 (1949).

[6]326 U.S. 465 (1946). An attorney living in Jackson, Mississippi, was the general solicitor for a railroad with offices in Mobile, Alabama. The railroad paid his living expenses in both towns. The taxpayer attempted to deduct his traveling expenses via train to and from Mobile. The Court held that the traveling expenses were not allowable as deduction. They went on to say that "The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors for traveling expenses to be an allowable deduction within the meaning of the income tax statute."

bama, was not permitted to deduct his traveling expenses from his home in Jackson, Mississippi, to his place of business in Mobile. On the other hand in a leading case,[7] a man living in Worcester, Massachussets, who acted as an official in a concern there, and who owned a wholesale business in New York was permitted to deduct his traveling expense between these two cities. Another leading case, *Peurifoy v. Commissioner*,[8] altered the previous law somewhat holding that a taxpayer may deduct expenditures of the type made when a taxpayer's employment is "temporary" as contrasted with "indeterminate." In *Claunch v. Commissioner*[9] a boilermaker traveled to various locations in his normal course of business, and upon completion of his duties returned to Jasper, Alabama, where he resided with his wife and children. The court distinguished the *Peurifoy* case, and followed the *Flowers* case.

Under the new exception to the rule in the *Flowers* case, which was set forth in the *Peurifoy* case, there is before the court a question of fact to be determined in each individual case of whether the work of a taxpayer has been temporary as distinguished from indefinite. In the noted case the court stated that, "No case involving the same factual

[7]Joseph H. Sherman, Jr., 16 T.C. 332 (1951). The taxpayer lived in Worcester, Massachusetts, and received about $4,000 as an official in a Worcester manufacturing concern. He also conducted a wholesale business in New York City from which he derived about $8,000, and on which he spent about 40 per cent of his time. The Tax Court allowed the taxpayer to deduct his traveling expenses to New York and his meals and lodging there, saying, "This is not the case of a taxpayer who keeps his place of residence at a point where he is not engaged in carrying on a trade or business and claims deductions for living expenses and costs of traveling to and from his residence." The court recognized that a taxpayer having two or more occupations which require him to spend a substantial amount of time in a number of cities may deduct traveling and other ordinary and necessary business expenses incurred in connection with attendance at a business location removed from his residence.

[8]358 U.S. 59 (1958). Under the rule in the Flowers case a taxpayer is entitled to deduct unreimbursed travel expenses only when they are required by "the exigencies of business." The Peurifoy case made an exception to this rule allowing a deduction for expenditures of the type made when the taxpayer's employment is "temporary" as contrasted with "indeterminate." This ruling has been the cause of much confusion among taxpayers in trying to determine when their traveling expenses will be allowable as a deduction. The petitioners worked for continuous periods of 20½, 12½, and 8½ months, respectively, at one location but maintained permanent residences elsewhere. Their traveling expenses were held deductible. Treasury Dept. Publication No. 300 provides that if an employee is required to work at a temporary or minor location outside the general area which is his principal place of employment (his tax home), the transportation expenses for daily round trips from his tax home to the temporary or minor post of duty are deductible.

[9]264 F.2d 309 (5th Cir. 1959). Taxpayer returned home upon completion of jobs at various places which he secured through his union. His jobs were generally temporary in nature. The taxpayer claimed deductions for amounts expended for meals and lodging while away from home. The Tax Court held the expenses were nondeductible as the petitioner's employment was not temporary but indefinite. The facts seem to be quite similar to those in the Puerifoy case, however, Chief Judge Hutcherson distinguishes the two cases on the basis that in the Claunch case the petitioner expected to and did stay on the job for a year's time. Chief Judge Hutcherson went on to say, "While I am the sole survivor of the court which decided the Flowers case and, convinced against my will, am of the same opinion still, it seems perfectly clear to me, as it does to my brothers, that in the absence of congressional action or a redecision in the Supreme Court, the law has been, is now, and must continue to be declared as the Court of Appeals declared it in the Peurifoy case." There seems to be a valid distinction made by the court between the Peurifoy case and the Claunch case. Since the court did not believe that the Claunch case was within the Peurifoy exception, they were compelled to follow the Flowers rule.

situation, as is shown in the instant case, has been brought to our attention." The taxpayer was faced with the necessity of going back and forth to the layout. This necessity was caused by the lack of living accommodations at the log sites and the necessity of carrying the tools back and forth to be repaired. The fact that the length of time of the work was not determined by the taxpayer; that the locations were not permanent; and that it was not the choice of the taxpayer to determine where he should live, all influenced the court in their decision. The contention that the tax home of the taxpayer was at the seven different layouts does not seem realistic. It appears that the rule in the *Peurifoy* case presupposes the "tax home" to be the "business headquarters" of the taxpayer. If he is away from "home" "temporarily," he seems to be entitled to a deduction. On the other hand if his activity is indefinite, then his "tax home" shifts, since his post of duty or business headquarters has shifted.

John B. Snowden, III

OIL AND GAS — EFFECT OF UNITIZATION UPON NONUNITIZED LANDOWNERS

In 1956 approximately 99.5% of the operating owners and 95.5% of royalty owners in the Soso field entered into an unitization agreement. This agreement was approved by the State Oil and Gas Board although the lands involved in the agreement included 1,170.33 acres which had not been included in the Soso field when the Oil and Gas Board originally laid out the field. The unitized area is speckled with 40 acre tracts designated as "individual drilling units" which represent those areas wherein 100% of the owners did not sign the agreement. In 1957 the operator for the unitized areas petitioned the Board for supplements, amendments and revisions to the 1952 Soso Special Field Rules. After proper notice and hearing, the Board changed the allowables for the various drilling units by treating the unitized area as one "fieldwide unit" and the non-unitized tracts as separate drilling units. This had the practical effect of reducing the daily allowables for the "individual units" and creating the possibility of drainage from them by the "fieldwide units." Owners of the "individual units" appealed on the grounds that the State Oil and Gas Board did not have the power to create different sized drilling units and that the creation of such units and the alteration of the daily allowables had the effect of compulsory unitization. HELD: Affirmed. The Board acted within its power and its acts did not compel appellants to unitize. *Corley v. Mississippi State Oil and Gas Board,* 105 So.2d 633 (Miss. 1958).

The advent of unitization[1] has created many complex legal problems, not the least of which is the problem of the effect of a voluntary unitization agreement upon the rights of a non-joining lessor or lessee.

[1]Unitization is commonly used to describe an arrangement for the joint development of an entire pool or a large part thereof as a unit." Hardwicke. Unitization Statutes: Voluntary Action or Compulsion, 24 Rocky Mt. L. Rev. 29, 30 (1951). See also: Superior Oil Co. v. Foote, 214 Miss. 87, 59 So.2d 85, *sugg. of error overruled;* 59 So.2d 844 (1952).

Since oil is migratory in nature and is susceptible of being drained through wells on adjoining lands, there is an implied covenant in every lease that the lessee protect the lessor's land from drainage.[2] The recovery allowed for a breach of this implied covenant may be either in the form of a cancellation of the lease[3] or in the form of monetary damages.[4] This right to recover for drainage has been modified in recent years by the "prudent operator" test.[5] Thus, the implied covenant requiring protection from drainage would easily provide a lessor with a cause of action for drainage if the lessee operated wells on an adjoining tract or if the draining wells were operated by a third party. The fact that the draining wells are being operated as a part of a unitized area should not affect the substantive rights of the lessor;[6] but as a practical

[2]Merrill, Covenants Implied in Oil and Gas Leases §§ 57-58 (1926).

[3]Brewster v. Lanyon Zinc Co., 140 Fed. 801 (8th Cir. 1905); Powers v. Bridgeport Oil Co., 238 Ill. 397, 87 N.E. 381 (1909); Coyle v. North American Oil Consolidated, 201 La. 99, 9 So.2d 473 (1942). The trend has been away from cancellation of the lease, especially in cases where one well has already been drilled.

[4]Gerson v. Anderson-Prichard Production Corporation, 149 F.2d 444 (10th Cir. 1945); Belleaud Planters, Inc. v. Union Oil Company of California, 144 F. Supp. 569 (W.D. La. 1956); Geary v. Adams Oil & Gas Co., 31 F. Supp. 830 (E.D. Ill. 1940); Hartman Ranch Co. v. Associated Oil Co., 10 Cal. 2d 232, 73 P.2d 1163 (1937); Wagner v. Sunray Mid-Continent Oil Company, 182 Kan. 81, 318 P.2d 1039 (1957); Culbertson v. Iola Portland Cement Co., 87 Kan. 529, 125 Pac. 81 (1912); Hughes v. Busseyville Oil & Gas Co., 180 Ky. 545, 203 S.W. 515 (1918); Hood v. Southern Production Co., 206 La. 642, 19 So.2d 336 (1944); Indian Territory Illuminating Oil Co. v. Rosemond; 190 Okla. 46, 120 P.2d 349 (1941); Indian Territory Illuminating Oil Co. v. Haynes Drilling Co., 180 Okla. 419, 69 P.2d 624 (1937); Barnard v. Monongahela Natural Gas Co., 216 Pa. 362, 65 Atl. 80 (1907); Kleppner v. Lemon, 197 Pa. 430, 47 Atl. 80 (1900); Stephenson v. Glass, 276 S.W. 1110 (Tex. Civ. App. 1925); *error denied,* 115 Tex. 192, 279 S.W. 260 (1926); Hall v. South Penn. Oil Co., 71 W.Va. 82, 76 S.E. 124 (1910). Note: the cases cited herein represent situations where, as in the Corley case, the lessee also leases land around the lessor's land and is operating the wells which the lessor is complaining of.

[5]Stanolind Oil & Gas Co. v. Sellers, 174 F.2d 948 (10th Cir. 1949); Tide Water Associated Oil Co. v. Stott, 159 F.2d 174 (5th Cir. 1946); Gerson v. Anderson-Prichard Production Corporation, 149 F.2d 444 (10th Cir. 1945); Ramsey v. Carter Oil Co., 74 F. Supp. 481 (E.D. Ill. 1947), *aff'd,* 172 F.2 622 (7th Cir.), *cert. denied,* 337 U.S. 958 (1949); Cooper v. Ohio Oil Co., 25 F. Supp. 304 (D.C. Wyo. 1938); Carter Oil Co. v. Dees, 340 Ill. App. 449, 92 N.E.2d 519 (1950); Myers v. Shell Petroleum Co., 153 Kan. 287, 110 P.2d 810 (1941); Ramsey Petroleum Corp v. Davis, 184 Okla. 155, 85 P.2d 427 (1938); Broswood Oil & Gas Co. v. Mary Oil & Gas Co., 164 Okla. 200, 23 P.2d 387 (1933); Texas Pacific Coal & Oil Co. v. Barker, 117 Tex. 418, 60 S.W.2d 1031, 60 A.L.R. 936 (1928); States v. Phillips Petroleum Co., 161 S.W.2d 366 (Tex. Civ. App. 1942); Hutchins v. Humble Oil & Refining Co., 161 S.W.2d 571 (Tex.Civ.App. 1942). When the lessee being sued is operating the wells that the lessor alleges are draining his property, some courts that usually apply the "prudent operator" test refuse to do so on the premise that "the defendant (lessee) is the beneficiary of the oil drained from plaintiff's (lessor's) land by the wells on the north and south which belong to the defendant. It has not only been saved the cost of drilling, equipping and operating a protecting well but it gets the oil anyway without plaintiff's being paid for it." Geary v. Adams Oil & Gas Co., 31 F. Supp. 830, 834 (E.D. Ill. 1940), and cases cited therein. But see: Phillips Petroleum Co. v. Millette, 221 Miss. 1, 72 So.2d 176 (1954), noted in 30 N.Y.U.L. Rev. 730 (1955).

[6]If the lessee has not joined the unitization agreement, the lessor should have a cause of action against the lessee for breach of the implied covenant of protection. The fact that the lessee has joined the unitization agreement without the consent of the lessor (a right the lessee has so long as the lessor's rights remain unaffected), Bruce v. Ohio Oil Co., 169 F.2d 709 (10th Cir. 1948), *cert. denied,* 336 U.S. 913 (1949), should not change matters either, because "his (the lessee's) covenant obligations, express and implied, probably will be unaffected by the pooling or unitization." Williams and Meyers, The Effect of Pooling and Unitization Upon Oil and Gas Leases, 45 Cal. L. Rev. 411, 434 (1957).

matter, the nonjoining lessor's rights will probably be restricted in an action involving drainage from the nonunitized to the unitized area.[7] Another problem that will occur more frequently and with much greater damage to the nonjoining lessor is the subsurface trespass which results when oil under the lessor's land is replaced by a less valuable substance: The landmark case determining whether a nonjoining lessor can collect damages for such a trespass is a case involving the reinjection of gas for storage underground.[8] That case and its more recent counterpart [9] held that there could be no trespass when the reinjected gas entered strata beneath another's land because the party injecting the gas loses title to such gas as soon as it is placed back in the ground. This theory serves as the basis for the statements in various cases and secondary authorities which indicate that a nonjoining party may not recover for damages incurred as a result of secondary operations which force the oil away from his land.[10] This general rule is modified only to the extent that liability will be imposed for damage caused by negligent acts.[11] When the unitization agreement has the sanction of the State regulatory body, adjacent landowners have no way to protect themselves from this type of trespass unless the unit operator was negligent.[12] A nonjoining lessee is in no

[7]Increased knowledge about secondary recovery and its effect has led courts to consider the participation in unitization by the lessee as an act of a "prudent operator;" and courts today are inclined to favor such operation even over the implied covenant of protection in favor of the lessor. "It appears that courts, in this situation, will more closely examine an alleged breach of an implied covenant than in an ordinary case." Horner, Implied Covenants: Effect on Secondary Recovery Methods, 4 Baylor L. Rev. 296, 306 (1952).

In Tide Water Associated Oil Co. v. Stott, 156 F.2d 174 (5th Cir. 1946) the court held that there was compliance with the implied covenant of protection, that the lessee could continue operating the adjoining unitized tracts and that if there was drainage from the nonjoining lessor's land, it was damage without injury.

[8]Hammonds v. Central Kentucky Natural Gas Co., 255 Ky. 685, 75 S.W.2d 204 (1934).

[9]Central Kentucky Natural Gas Co. v. Smallwood, 252 S.W.2d 866, 2 O. & G.R. 19 (Ky. App. 1952).

[10]In the area of liability for a subsurface trespass there seems to be developing a rule of capture in reverse. Under the rule of capture, one could pull oil from strata under another's land out of a well bottomed on his own land. Today, it seems as if one can push the oil from the strata under another's land by injecting—through a well bottomed on his own land—a less valuable substance which will replace the oil pushed from the other's land. See: Tidewater Associated Oil Co v. Stott, 159 F.2d 174 (5th (Cir. 1946); Williams and Meyers, Adverse Possession and Trespass in the Law of Oil and Gas, 29 Rocky Mt. L. Rev. I (1956); Brown and Myers, Some Legal Aspects of Water Flooding, 24 Tex. L. Rev. 456 (1946); Hughes, Legal Problems of Water Flooding, Recycling and Other Secondary Operations, 9th Institute on Oil and Gas Law and Taxation (1958) p. 139; McElroy, Water Flooding of Oil Reservoirs, 7 Baylor L. Rev. 18, 36 (1955); Simmons, Problems of the Tract in Which All or a Portion of the Interested Parties Do Not Agree on Unit Operation, 3d Institute on Oil and Gas Law and Taxation 178 (1952).

[11]But, Cf., West Edmond Lime Unit v. Lillard, 265 P.2d 730, 3 O. & G.R. 1426 (Okla. 1954) where salt water from defendant's injection well caused damage to plaintiff's well. Plaintiff could not collect for the alleged trespass caused by salt water from defendant's well replacing oil beneath plaintiff's land. The court does not mention negligence or the reasonableness of defendant's action in denying liability for this type act. One must assume, then, that the court did not think these elements were essential to liability. This aspect of the case makes the decision seem to be more far-reaching. It is the first case not to mention negligence, thus implying that defendant would not have been liable even had there been negligence.

[12]"Where an order of the State regulatory body authorizing such water flooding and repressuring operations are conducted in accordance with such order, the unit

better position than a nonjoining lessor because, the lessee too might be damaged by unit operations on adjacent land without being able to recover damages therefor. If a lessee refuses to join a unitization agreement he cannot later try to recover for damage done to his leasehold by the unit operations, for the same reasons that cause the lessor to be denied recovery.[13] There is an increasing trend toward the proposition that a lessee is under a duty to utilize secondary recovery operations (and thus, unitization) since such operations are in the best interest of the lessor.[14] Thus, a nonjoining lessee cannot protect himself against drainage by adjoining unit operations, and he may be liable for breach of an implied covenant for not unitizing and joining in secondary recovery operations.

"In the absence of explicit statutory authority, neither the courts nor an administrative body has the power to force . . . unitization upon unwilling owners of mineral estates."[15] The Mississippi Supreme Court stated in the *Corley* case that the co-equal and correlative rights of nonjoining owners were protected and that "we do not consider, and this case does not involve, any question of compulsory unitization of an entire oil field or pool."[16] Upon examination of the facts and of the law involved, it is seen that a nonjoining lessor may not recover for damage done by subsurface trespass, that damages recoverable for drainage are

operator should not be liable to the owners of the interests in the nonunitized tract." Simmons, Problems of the Tract in Which All or a Portion of the Interested Parties Do Not Agree on Unit Operations, 3d Institute on Oil and Gas Law and Taxation 178-179 (1952).

[13]See: Tide Water Associated Oil Co. v. Stott, 156 F.2d 174 (5th Cir. 1946) and Boggess v. Milam, 127 W.Va. 659, 34 S.E.2d 267 (1945).

[14]Merrill, Covenants Implied in Oil and Gas Leases, § 77 (2d ed. 1940); Utilities Production Co. v. Carter Oil Co., 72 F.2d 655, 659 (10th Cir. 1934); Griffith v. Gulf Refining Co., 215 Miss. 15, 27, 28, 60 So.2d 518, 521, 522, *Sugg. of Error Overruled* 61 So.2d 306 (1952) (dicta); In re Shailer's Estate, 266 P.2d 613 (Okla. 1954). "We have decided, then, there is an implied covenant to adopt secondary recovery methods . . . ." Hughes, Legal Problems of Water Flooding, Recycling and Other Secondary Operations, 9th Institute on Oil and Gas Law and Taxation 115 (1958).

[15]37 A.L.R.2d 434. See also: Western Gulf Oil Co. v. Superior Oil Co., 92 Cal. App.2d 299, 206 P.2d 944 (1949); Dobson v. Arkansas Oil & Gas Commission, 218 Ark. 160, 235 S.W.2d 33 (1950); Merrill, Unitization Problems: The Position of the Lessor, 1 Okla. L. Rev. 119, 128 (1948); Meyers, Pooling and Unitization: Voluntary Compulsory 217 (1957).

[16]Although the court states that it does not believe that this decision involves compulsory unitization, the majority opinion goes on to state: "We do not think it would be fair or equitable to permit a very small minority of small fractional owners in this common source of supply of hydrocarbons to prevent the Board and the overwhelming majority of the operating and royalty owners from pursuing a unitization program designed to obtain a maximum recovery from the field." If compulsory unitization does not exist, "a very small minority of small fractional owners" has as one of its co-equal and correlative rights the right to disagree with and refuse to join a unitization agreement, and thus prevent its coming into being. Dobson v. Arkansas Oil & Gas Commission, 218 Ark. 160, 233 S.W.2d 33 (1950) in which 3% of the operators and 4% of the royalty owners refused to agree to unitization, and the Arkansas Court gave them the protection they deserved by refusing to unitize. At the time the Dobson case was decided Arkansas, like Mississippi today, had no compulsory unitization statute. . . . . .

[17]Although there is always the possibility of sub-surface trespass when someone fails to sign a unitization agreement, such a trespass is bound to happen to appellants in the instant case because the unitized area is not contiguous. Some of the nonunitized areas are surrounded by the fieldwide unit, and subsurface trespass is inevitable if the water driven recovery, stated as the purpose of this unitization agreement, is to be used.

negligible, and that a nonjoining lessee is confronted with the same problems. While the court is speaking in nebulous terms about protecting "co-equal rights," the practical legal effect of the court's decision was to place the nonjoining owners in a position where they could either refuse to join, and thereby receive damnum absque injuria coupled with accompanying reduced allowables based upon the unitized area, or join the unitization agreement—although not desiring to do so—and protect themselves.[18] The Supreme Court was well within the bounds of statutory interpretation in deciding that the Oil and Gas Board acted within its authority. Thus, it seems that Mississippi and other states not having compulsory unitization statutes may accomplish the intended purpose of such statute by giving the existing conservation statutes their broadest possible meaning.

Lee Davis Thames

Oil and Gas Leases — Production During and After the Primary Term

A lease, executed on Augut 22, 1944, provided for a primary term of ten years and was to remain in effect so long thereafter as oil or gas was produced from the leasehold or lands pooled therewith. The lease further provided that "if after discovery of oil . . . the production thereof should cease from any cause, this lease shall not terminate if lessee commences additional drilling or reworking operations within sixty days thereafter, or if it be within the primary term, commences or resumes the payment or tender of rentals, or commences operations for drilling or reworking on or before the rental paying date next ensuing after the expiration of sixty days from date of completion of dry hole or cessation of production." Defendant-lessee made rental payments until 1948 when a well was completed which produced in paying quantities until August 1, 1953. Actual production continued until the first week in April, 1954, when reworking operations were commenced. The well was shut down on April 8, 1954. Operations for the drilling of a new well were begun on May 7, 1954, on land pooled with the leasehold; this well was later brought in as a producer. Before the end of the primary term a third well was brought in on the drilling unit containing the land in question which was producing oil in paying quantities at the end of the primary term. Plaintiff, the holder of a "top lease," sought to cancel the original lease contending that the lease expired by its terms because the lessee failed to commence drilling or reworking operations within sixty days after the lease ceased to produce oil in paying quantities. The lower court adjudged the original lease to be in effect and confirmed the title of defendants therein. Held: Affirmed. Production in paying quantities is not necessary to avoid commencement of new drilling operations or

[18]This is reminiscent of the involuntary equitable pooling that the Mississippi Supreme Court created in 1952 and 1953 when the leases involved in that series of cases had been drawn up before Mississippi enacted its compulsory pooling statute; and yet the court, without having the power to do so, was able to compulsorily pool the leases so far as the general economic and legal effect was concerned. See: Gillis, Involuntary Equitable Pooling in Mississippi, 27 Miss L. J. 10 (1955).

rental payments during the primary term of the lease. Even if paying quantities were necessary, this lease would not terminate as there would be no duty to resume payment of rental until the anniversary date next ensuing sixty days after cessation of production, as provided in the lease.[1] *Roberts v .Corum*, 112 So.2d 550 (Miss. 1959).

The question of whether actual production or production in paying quantities is necessary for a lessee to avoid the payment of delay rentals or to avoid the commencement of further drilling during the primary term of the lease was presented to the Mississippi Supreme Court for the first time in the noted case. Although this proposition has been seldom litigated, most jurisdictions support the rule adopted in the principal case which requires only actual production to keep the lease in effect during the primary term.[2] Texas is the only jurisdiction which has deviated from the majority rule and has required, in at least two cases, that production be in paying quantities.[3] A series of Federal cases from West Virginia may appear to require production in paying quantities to prevent termination of the lease;[4] however, these cases were decided on the issue of *bad faith* of the lessee as indicated by minute production or lack of production. Since West Virginia does not require production in paying quantities to extend the lease beyond the primary term, it would be anomalous for her to require that standard merely to keep the lease in effect during the primary term. In the principal case, Mississippi, by dicta, follows the majority rule as to the quantum of production necessary to extend the lease beyond the primary term. When considering

[1]Under the present facts there was no anniversary after that period, as the primary term expired before such time. The court also inferred by dicta that paying production was necessary to extend the lease beyond the term as it quoted from Murphy v. Garfield Oil Co., 98 Okla. 273, 225 Pac. 676 (1924), as follows: "If an oil or gas well was drilled, whether oil or gas was in paying quantities or not just so oil or gas was obtained—not a dry hole—one such well was sufficient to prolong the life of the contract for the initiative period, *and to keep the contract in force after the initiative period oil or gas in paying quantities were necessary.*"

[2]Baker v. Hoffman, 176 Kan. 554, 271 P.2d 276, 3 O. & G.R. 1662 (1954); Gillespie v. Ohio Oil Co., 260 Ill. 169, 102 N.E. 1043 (1913); Murphy v. Garfield Oil Co., supra note 1; Long v. Magnolia, 166 Neb. 410, 89 N.W.2d 245, 9 O. & G.R. 41 (1958).

[3]Continental Oil Co. v. Boston-Texas Land Trust, 221 F.2d 124 (5th Cir. 1955) stated by way of dictum that production which would keep the lease in effect during the term was production in paying quantities. West v. Continental Oil Co., 91 F. Supp. 505, (S.D. Tex. 1950), *affirmed* 194 F.2d 863 (5th Cir. 1952) decided that paying quantities were necessary, but held for lessee because lessor failed to prove that such quantities were not obtained.

[4]Foster v. Elk Fork Oil & Gas Co., 90 Fed. 178 (4th Cir. 1898) says, "The consideration . . . for this lease was the prospective rents and royalties the lessor would enjoy if the lessee, by diligent search could find oil and gas in paying quantities. If the lease failed to bind the lessee to diligent search for oil or gas, it was without consideration, binding on neither party, and avoidable at the pleasure of either." Thus, the decision seems to rely not upon failure to produce in paying quantities, but upon failure to diligently search and develop. Here the lessee drilled one dry hole shortly after commencement of a ten year term and then ceased development. Barnsdall v. Boley, 119 Fed. 191 (N.D. W.Va. 1902) seems also to depend on the fact that the drilling of one dry hole does not vest title and that the lessee after drilling one dry hole failed to diligently develop the lease. Hutchinson v. McCue, 101 F.2d 111 (4th Cir. 1939) contains language that might lead one to believe that production must be in paying quantities to continue the term, but this case too is decided on failure to use diligence. Here this court said that the lessee "conspicuously failed to operate the premises with that *diligence and efficiency* which are required of a lessee." There the lessee failed both to pay rentals and to produce during the term.

that question, the courts have made no distinction between those leases including "in paying quantities" in their "thereafter clauses" and those leases which omit these words. Following this interpretation of leases, the vast majority of courts hold that paying production is necessary to extend the lease beyond the primary term. The leading proponents of the minority rule are Kentucky and West Virginia, which hold that actual production is sufficient to extend the lease beyond the primary term.[6] While Kentucky applies the actual production test, when the question of production in paying quantities is raised the Court has, in some cases, said that the determination of whether production was in paying quantities will be left to the sole discretion of the lessee exercising good faith.[7]

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[5]The following cases hold that paying quantities are necessary to extend the lease beyond the term although paying quantities are not specifically mentioned in the habendum: Homes Royalty Ass'n. v. Stone, 199 F.2d 650 (10th Cir. 1950); Gas Ridge, Inc. v. Surburban Agricultural Properties, Inc., 150 F.2d 363 (5th Cir. 1945), *rehearing denied* 150 F.2d 1020, *cert. denied* 326 U.S. 796, *rehearing denied* 327 U.S. 815 (1946); Bendem-Trees Oil Co. v. Davis, 107 F.2d 981 (6th Cir. 1939) *cert. denied* 310 U.S. 634 (1939); Simpson v. Stanolind Oil & Gas Co., 114 F. Supp. 731 (E.D. Okla. 1953), *affirmed* 210 F.2d 640 (10th Cir. 1954); Ware v. Stafford, 307 P.2d 950, 7 O. & G.R. 416 (Cal. 1957); Tate v. Stanolind Oil & Gas Co., 172 Kan. 351, 240 P.2d 465, 1 O. & G.R. 341 (1952), wherein the court said that in order to extend the lease paying quantities were necessary, but where the lessee was drilling at the end of the term, a reasonable time should be allowed for completion in paying quantities; Parten v. Webb, 197 La. 197, 1 So.2d 76 (1941); Brown v. Sugar Creek Syndicate, 195 La. 865, 197 So. 583 (1940); Cox v. Acme Land & Investment Co., 192 La. 688, 188 So. 742 (1939); Palmer Corp. of Louisiana v. Miles, 174 La. 470, 141 So. 31 (1932); Caldwell v. Alton Oil Co., 161 La. 139, 108 So. 314 (1926); Berthelot v. Loy Oil Co. 95 Mont. 434, 28 P.2d 187 (1934); Brown v. Shafer, 325 P.2d 743, 9 O. & G.R. 202 (Okla. 1958); Townsend v. Creekmore-Rooney Co., 332 P.2d 35, 9 O. & G.R. 1035 (Okla. 1958); Henry v. Clay, 198 Okla. 639, 181 P.2d 545, 3 O. & G.R. 1713 (1954); Walden v. Potts, 194 Okla. 453, 152 P.2d 923 (1945); Woodruff v. Brady, 181 Okla. 105, 72 P.2d 709 (1937); Gypsy Oil Co. v. Marsh, 121 Okla. 135, 248 Pac. 329 (1926); Roach v. Junction Oil & Gas Co., 72 Okla. 213, 179 Pac. 935 (1919); Rogers v. Osborn, 152 Tex. 540, 261 S.W. 2d 311, 2 O. & G.R. 1439 (1953); Garcia v. King, 139 Tex. 578, 164 S.W.2d 509 (1942); Archer v. Skelly Oil Co., 314 S.W.2d 655 (Tex. Civ. App. 1958); Sullivan and Garnett v. James, 305 S.W.2d 891, 8 O. & G.R. 1141 (Tex. Civ. App. 1957); Holchack v. Clark, 284 S.W.2d 399, 5 O. & G.R. 595 (Tex. Civ. App. 1955); Morrison v. Swaim, 220 S.W.2d 493 (Tex. Civ. App. 1945); Cox v. Miller, 184 S.W.2d 323 (Tex. Civ. App. 1945); Odward v. Foster, 5 S.W.2d 240 (Tex. Civ. App. 1928).

Most of the cases that have construed the meaning of "production" have involved leases with the words "production in paying quantities" in the habendum. In recent years these words have been more often omitted. Continental Oil Co. v. Boston-Texas Land Trust, 221 F.2d 124 (5th Cir. 1955); Continental Oil Co. v. Osage Oil & Refining Co., 69 F.2d 19 (10th Cir. 1934); Wilbur v. U.S. ex rel. Osage Oil & Refining Co., 54 F.2d 437 (D.C. Cir. 1931); Macco Constr. Co. v. Fickert, 76 Cal.App.2d 295, 172 P.2d 951 (1946); Cowden v. General Crude Oil Co., 217 S.W.2d 109 (Tex. Civ. App. 1949).

For other cases on leases including "in paying quantities," see 2 Summers, Oil and Gas §§ 293, 298 (Perm. ed. 1959). See also Fifth Annual Institute on Oil and Gas Law and Taxation, Southwestern Legal Foundation, pp. 337-381.

[6]Inson v. Edra Lee Oil & Gas Co., 241 Ky. 754, 45 S.W.2d 3 (1932); Sawyer v. Potter, 223 Ky. 359, 3 S.W.2d 758 (1928); Enfield v. Woods, 198 Ky. 328, 248 S.W. 842 (1923); Reynolds v. Whiteplains Oil & Gas Co., 199 Ky. 243, 250 S.W. 975 (1923); Ohio Fuel Oil Co. v. Greenleaf, 84 W.Va. 57, 99 S.E. 274 (1919); Barbour, Stedman & Co. v. Tompkins, 81 W.Va. 115, 93 S.E. 1038 (1917); South Penn Oil Co. v. Snodgrass, 71 W.Va. 438, 76 S.E. 961 (1912) held that a lease for a term and as long thereafter as "oil or gas is produced" meant as long as the premises were diligently and efficiently operated, provided that minerals had been found within the term. McGraw Oil & Gas Co. v. Kennedy, 65 W.Va. 595, 64 S.E. 27 (1909).

[7]Reynolds v. White Plains Oil & Gas Co., supra note 6 reads, "Our rule is to protect the good faith lessee who is prosecuting work for development with reasonable diligence against the cancellation of his lease, but to apply the strict rule to the mere speculator who would take long term leases, holding them without development in the

Although these are the principal states following the minority view, that view has been expressed elsewhere.[8]

Since the Mississippi Court made an extensive analysis of the question of the amount of production necessary to keep the lease alive during the primary term, it is very probable that the Court will follow this rule in the future. Additionally, the Court made reference to the rule concerning extension of the lease beyond the primary term by the quotation from the *Garfield*[9] case. Whether the Court will choose to follow this dicta in the future is, of course, unknown. In support of the rule that production in paying quantities is necessary to extend the lease, the courts have advanced the argument that the primary purpose of the lease is for the lessor to receive royalty payments.[10] This argument seems to overlook the fact that the lessor will receive his royalty without risk and without deduction for operating expenses. Apparently, the purpose of this argument is to protect lessors from speculators who wish to obtain the leasehold in the hope that it will increase in value. Certainly it is reasonable to afford this protection to lessors who are less able to recognize the speculative value of the land. On the other hand it seems unreasonable to allow the lessor, who takes no risk at all, to remove the lessee, who has drilled one or more wells at great expense and risk, simply because there has been no production in excess of the cost of operation, when the lessee in good faith believes that further development will be profitable. It would seem to be the better rule to allow the lease to remain in effect so long as there is actual production and the lessee in good faith is diligently developing the lease.

J. E. Pool

Oil and Gas—Mineral Interest or Nonparticipating Royalty Interest

This was an action involving determination of rights under a reservation contained in a deed. When the lands were not under any oil and gas lease, grantors executed to grantee a deed to a parcel of land wherein the grantors made a reservation providing that they reserved for themselves, their heirs and assigns one-eighth of all the oil and gas "which may be produced from the lands to be delivered in tanks and pipelines in the customary manner." Lower court interpreted the reservation as one of minerals in place, and grantors' successors in title appealed. Held: Af-

hope that others may explore the region and make the holdings valuable . . . ." Enfield v. Woods, supra note 6 interprets the words, "as long thereafter as oil and gas, or either, is produced therefrom . . .," as follows: "This, of course, means a production of oil or gas in such quantities as to be susceptible of division, so as to pay the landowner a royalty, even though small. A mere showing of oil manifestly is not sufficient, even though reduced. The production must be tangible and substantial, but it need not be great." See also Fifth Annual Institute on Oil and Gas Law and Taxation, supra note 5.

[8]Gillespie v. Ohio Oil Co., 260 Ill. 169, 102 N.E. 1043 (1913); Indiana Natural Gas & Oil Co. v. Beales, 166 Ind. 684, 76 N.E. 520 (1905); Hudson v. Lyons, 199 Okla. 348, 186 P.2d 309 (1947).

[9]Murphy v. Garfield Oil Co., supra note 1.

[10]Berthelot v. Loy Oil Co., supra note 5 is but one example of many decisions reciting this reasoning.

firmed.[1] The reservation reserved to the grantors an undivided one-eighth interest in the oil and gas in place, rather than a nonparticipating royalty interest. *Mounger v. Pittman,* 108 So.2d 565 (Miss. 1959).

The courts have defined the nature of both a mineral interest in oil and gas and a nonparticipating royalty interest, and by the use of apt language either can be reserved by the grantor in a deed. The former is an expense-bearing interest in the minerals in, on and under the land owned by a person other than the surface owner.[2] The incidents attaching to this interest in the ownership of the minerals include the right to do anything necessary to discover oil and gas, the right to execute leases and the right to receive bonuses, delay rentals and royalty payments.[3] All these rights are transferable and the grantor can transfer all of them, or only part of them.[4] The latter interest entitles the holder to an expense-free share of the oil and gas produced,[5] with the prefix "nonparticipating" indicating that the holder does not share in bonuses or delay rentals, nor in the right to execute leases or to explore and develop.[6] In interpreting a reservation to determine what type of interest was reserved, the courts first decide if the deed is unambiguous on its face, for if it is, then parol evidence of surrounding circumstances and the practical construction of the deed by the parties is not admissable.[7] The courts then interpret the deed, utilizing parol evidence of extrinsic circumstances only if there is ambiguity, determining what interest was reserved by the grantor. There are standard words of mineral ownership which usually unmistakably reserve a mineral interest,[8] and will do so even with the addition of words commonly connected with a royalty interest.[9] When the standard words of mineral ownership are omitted from the reservation, the inclusion of the word "produced" takes on greater significance.[10]

In construing the reservation in the noted case, the majority relied

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[1]Decision was 5-3 with McGehee, C.J., and Roberds and Arrington, J.J., dissenting.

[2]Williams and Myers, Manual of Oil and Gas Terms (1937).

[3]Westbrook v. Ball, 222 Miss. 788, 77 So.2d 274 (1955); McNeese v. Renner, 199 Miss. 203, 21 So.2d 7 (1945).

[4]Westbrook v. Ball, supra note 3.

[5]"A royalty is a share in proceeds, free and clear of all expenses." Palmer v. Crews, 203 Miss. 806, 35 So.2d 430, 4 A.L.R. 483 (1948).

[6]Westbrook v. Ball, supra note 3; 3A Summers, Oil and Gas, § 599 (Perm. ed. 1958).

[7]The Interpretation of Mineral and Royalty Deeds—The Manipulation of the Parol Evidence Rule, 38 Minn. L. Rev. 857 (1954).

[8]"Where the instruments use the words 'oil, gas and other minerals in or under' the land as descriptive of the interest intended to be created, the courts ordinarily hold that a mineral fee interest is created." Summers, supra note 6.

[9]Little v. Mountain View Dairies, 35 Cal.2d. 232, 217 P.2d 416 (1950). The practice of adding the phrase "and which may be produced" to a deed phrased in terms of a share of oil and gas "in and under," with no words to indicate that it is other than a mineral interest, will probably create a mineral interest.

[10]Miller v. Speed, 248 S.W.2d 250 (Tex. Civ. App. 1952). The court pointed out that "A 1/24 of all the oil in and under and that may be produced is an interest in minerals in place in the ground, but that is a different interest than a 1/24 of all the oil that may be produced, saved and made available for market." The same emphasis has been found in Hardy v. Greathouse, 406 Ill. 365, 94 N.E.2d 134 (1950); Mitchell v. Hannah, 123 Mont. 152, 208 P.2d 812 (1949); and Armstrong v. McCracken, 204 Okla. 319, 239 P.2d 590 (1951).

heavily on the cases of *Westbrook v. Ball*[11] *and McNeese v. Renner,*[12] and a principle followed therein that in *reserving minerals* a grantor retains all the rights incidental to a mineral interest which are not specifically granted away. This principle would seem to be applicable only *after* a positive decision that the interest reserved is a mineral interest; it should not serve as the basis for the decision itself, for the converse of the principle is also true: when reserving a royalty interest in a warranty deed, all rights incidental to a mineral interest pass to the grantee, or otherwise the grantor would breach his own warranty. In the majority opinion, the Court makes an unusually unequivocal statement[13] in the face of a strong dissent and after having considered the deed unambiguous, thus excluding all evidence of surrounding circumstances and practical construction by the parties.[14] It is submitted that this reservation was in fact ambiguous,[15] that consequently extrinsic evidence should have been allowed and considered, and that based upon such consideration this reservation could easily have been termed a non-participating royalty interest—the conclusion reached by the majority certainly does not seem inescapable.

C. Willis Connell, Jr.

TORTS—LANDOWNER'S LIABILITY TO INJURED TRESPASSING CHILD—ATTRACTIVE NUISANCE DOCTRINE—SECTION 339 OF THE RESTATEMENT

Action was brought by a two and one half year old boy through his father as guardian ad litem, for serious injury sustained from falling into defendant's private swimming pool while trespassing on his property. The pool was located at the rear of the defendant's house, which was surrounded by a stucco wall except for a ten foot opening in the wall in the garage area. No gate was maintained over this opening, and the pool was visible through it from the street. At the close of the swimming season, the water in the pool was only partially drained, and during the winter months prior to the accident, the customary leaves, silt and algae had accumulated in the pool. On the last day of January, four months after the close of the swimming season, the plaintiff gained access to the pool through the opening in the wall, and was later found lying face down in the water. Recovery was sought on the theory outlined in section

[11]Westbrook v. Ball, supra note 3.

[12]McNeese v. Renner, supra note 3.

[13]"The inescapable conclusion is that the interest reserved by the grantors was an estate in the oil and gas in place."

[14]The extrinsic evidence excluded by the Court indicated that the parties claiming through the reservation never attempted to lease, explore, or go upon the premises, whereas the successor of the grantee more than once had executed mineral leases on the lands, and had collected bonus money and delay rentals thereon. Such construction by the parties indicates that they thought the reservation created a royalty interest.

[15]The construction given to the instrument by the parties subsequent to its execution should carry much weight. Anderson v. Butler, 203 Miss. 512, 35 So.2d 709 (1948).

339 of the *Restatement of Torts*,[1] The jury returned a verdict in favor of the plaintiff in the sum of $50,000. HELD: Affirmed, with three justices dissenting. The conditions necessary to establish liability on the theory of Section 339 of the *Restatement* have been met, although it is established in California that a private swimming pool is not an attractive nuisance as a matter of law. *Reynolds v. Willson*, 331 P.2d 48 (Cal. 1958).

When an adult trespasses upon land and suffers injury from some passive condition which is encountered, the courts are uniformly in agreement with the general rule that the landowner is under no liability to him.[2] He is a wrongdoer and has no right to expect that he should be provided with a safe place to trespass. The only duty owed him is to refrain from wilful or wanton injury.[3] When the trespasser is a child, due to his immaturity and lack of judgment, the reason for this general rule may be lacking. That a special rule should be applied in the case of children was first set forth in an English case in 1841,[4] where a child was hurt as result of tampering with a negligently loaded cart on the highway. The special rule first appeared in this country in the Supreme Court in the case of *Sioux City & Pacific Railroad Co. v. Stout*,[5] where recovery was allowed a child who trespassed on railroad land and was injured while playing with a turntable. From this and similar decisions, the "turntable doctrine" was devised, and the doctrine was known by this name until the nineteen twenties.[6] Later the idea became known as the "attractive nuisance" doctrine. Under this theory it was logical that if the child was not lured or attracted onto the property, but trespassed for his own reasons and subsequently discovered the condition which caused injury, recovery would be denied, and it was so held by Mr. Justice Holmes in the *Britt* case[7] in 1921, in which the child was in no way induced to trespass by the pool of poisoned water which killed him. This decision has subsequently been overruled by the Supreme Court,[8] but was followed for years by many state courts, seven of which still

[1]Restatement, Torts § 339 (1934): "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if (a) the place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know, and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possessor of maintaining the condition is slight as compared to the risk to young children involved.

[2]Hooker v. Routt Realty Co., 102 Colo. 8, 76 P.2d 431 (1938); Susquehanna Power Co. v. Jeffries, 159 Md. 465, 150 Atl. 788 (1930); Boyer v. Guidicy Marble Co., 246 S.W.2d 742 (Mo. 1952); Southern v. Cowan Stone Co., 188 Tenn. 576, 221 S.W.2d 809 (1949).

[3]Westsmoreland v. Mississippi P. & L. Co., 172 F.2d (5th Cir. 1949); Trice Coffee Co. v. Clemens, 168 Miss. 748, 151 So. 175 (1933); Nalepinski v. Durner, 259 Wis. 583, 49 N.W.2d 601 (1951).

[4]Lynch v. Nurdin, Q. B. 29, 113 Eng. Rep. 1041 (1841).

[5]84 U.S. (17 Wall.) 657 (1873).

[6]Hudson, The Turntable Doctrine in the Federal Courts, 36 Harv. L. Rev. 826 (1923).

[7]United Zinc & Chem. Co. v. Britt, 258 U.S. 268 (1921).

[8]Best v. District of Columbia, 291 U.S. 411 (1934).

adhere to it.[9] The great majority of courts have discarded both the theory and the necessity for attraction onto the land.[10] The rule pertaining to trespassing children has been simply swallowed up in the sea of ordinary negligence liability, the essential question being merely one of whether there is an unreasonable risk of harm to children.[11] However, at present there are seven jurisdictions which continue to repudiate any distinction between trespassing children and adults.[12] In 1934, the *Restatement of Torts,* in section 339, discarded the theory of allurement to trespass, and treated the special rule as one of ordinary negligence liability. This section has been frequently cited and has received such general acceptance by a majority of the courts as the best available statement of the majority rule that it must be taken as a definite point of departure from the "attractive nuisance" doctrine.[13] The tendency of the courts has been to seek a middle ground which will allow recovery in a limited group of cases but without protecting all children against everything.[14] Section 339 appears to offer this middle ground. As to injury or death sustained from water hazards,[15] many jurisdictions which recognize a special rule pertaining to children deny application to the common, obvious water hazards, where there is no unusual or concealed danger, primarily due to the fact that water hazards exist everywhere.[16] But even in these jurisdictions there are indications that a different rule would prevail if the death or injury had resulted from an uncommon, hidden, or concealed

[9]Colorado, Esquibel v. City & County of Denver, 112 Colo. 564, 151 P.2d 757 (1944); Indiana, Indianapolis Motor Speedway Co. v. Shoup, 88 Ind. App. 572, 165 N.E. 246 (1929); Louisiana, Fincher v. Chicago, R. I. & Ry., 143 La. 163, 78 So. 433 (1918); Mississippi, Shemper v. Cleveland, 212 Miss. 113, 54 So.2d 215 (1951); Missouri, Holifield v. Wigor, 361 Mo. 636, 235 S.W.2d 564 (1951); South Carolina, Hancock v. Aiken Mills, 180 S. C. 93, 185 S.E. 188 (1935); Tennessee, Gouger v. Tenn. Valley Auth., 188 Tenn. 96, 216 S.W.2d 739 (1949).

[10]Beaston v. James Julian, Inc., 49 Del. 521, 120 A.2d 317 (1956); Kahn v. James Burton Co., 4 Ill. 2d 614, 126 N.E.2d 836 (1955); Ford v. Blythe Bros., 242 N.C. 347, 87 S.E.2d 879 (1955); Selby v. Tolbert, 56 N.M. 718, 249 P.2d 498 (1912); Verricia v. Society Di J. S. Del Lazio, 366 Pa. 629, 79 A.2d 237 (1951); Banker v. McLaughlin, 146 Tex. 434, 208 S.W.2d 843 (1948).

[11]Prosser, Trespassing Children, 47 Calif. L. Rev. 448 (1959).

[12]Maine, Lewis v. Mains, 150 Me. 75, 104 A.2d 432 (1954); Maryland, Conrad v. City of Takoma Park, 208 Md. 363, 118 A.2d 497 (1955); Massachusetts, Urban v. Central Mass. Elec. Co., 301 Mass. 519, 17 N.E.2d 718 (1938); New Hampshire, Devost v. Twin City Gas Co., 79 N. H. 411, 109 Atl. 839 (1920); Ohio, Ware v. City of Cincinnati, 93 Ohio App. 431, 111 N.E.2d 401 (1952); Rhode Island, Houle v. Carr-Consol. Biscuit Co., 125 A.2d 143 (1956); Vermont, Trado v. Lazarus, 116 Vt. 221, 73 A.2d 306 (1950).

[13]Prosser, Trespassing Children, 47 Calif. L. Rev. 436 (1959).

[14]Prosser, Torts § 76 (2d ed. 1955).

[15]Luallen v. Woodstock Iron & Steel Corp., 235 Ala. 621, 184 So. 182 (1938); Carmichael v. Little Rock Housing Auth., 227 Ark. 470, 299 S.W.2d 198 (1957); Plotzki v. Standard Oil Co., 228 Ind. 518, 92 N.E.2d 632 (1950); Sroufe v. Garden City, 148 Kan. 874, 84 P.2d 845 (1938); Vincent v. Barnhill, 203 Miss. 740, 34 So.2d 363 (1948); McComb City v. Hayman, 121 Miss. 525, 87 So. 11 (1920); Thompson v. Ill. Cen. Ry. Co., 105 Miss. 636, 63 So. 185 (1913).

[16]Alabama, Luallen v. Woodstock Iron & Steel Co. 236 Ala. 621, 184 So. 182 (1931); Arizona, Salladay v. Old Dominion Copper Mining Co., 12 Ariz. 124, 100 P. 441 (1909); Colorado, Phipps v. Mintze, 116 Colo. 188, 180 P.2d 133 (1947); Georgia, Crawford v. Pollard, 55 Ga. App. 702, 191 S.E. 162 (1937); Iowa, Hect. v. Des Moines Playground Asso., 227 Iowa 81, 287 N.W. 259 (1939); Kentucky, Von Almen v. Louisville, 180 Ky. 441, 202 S.W. 880 (1918); Mississippi, Vincent v. Barnhill, 203 Miss. 740, 34 So.2d 363 (1948); Oregon, Riggle v. Lens, 71 Ore. 125, 142 P. 346 (1914); South Dakota, McCleod v. Tri-State Milling Co., 71 S.D. 362, 24 N.W.2d 485 (1946).

danger. And in frequent cases where extremely young children under the age of five or six are involved, and the landowner has reason to know that such children might trespass near water, the risk of harm or injury is considered unreasonable, and recovery is allowed,[17] although there are exceptions.[18] Recovery is also often allowed when the risk is greater than the ordinary, obvious risk which accompanies a body of water.[19] Of course, in the seven states which continue to repudiate the distinction between trespassing adults and children,[20] recovery for injury or death from water hazards is consistently refused.[21] In Mississippi, the actual attractive nuisance doctrine is accepted in its entirety, thus aligning Mississippi with the seven remaining jurisdictions[22] that consider the *Britt* case[23] to be the law and hold that the child must be attracted or allured upon the land by the very thing which causes him injury. Mississippi first recognized an exception to the general rule as to landowners' liability to trespassing children in 1887 in a case in which the words "attractive nuisance" were not mentioned, but the language used bordered upon its theory.[24] Two years later similar reasoning was applied in the case of a seven year old boy who was killed while playing on lumber piled in a street.[25] Three cases followed dealing with injuries sustained by coming in contact with a live electric wire while climbing a tree,[26] getting a foot crushed while playing with a turntable,[27] and by touching a wire of a street lamp which had fallen to the ground.[28] Two succeeding cases were concerned with drowning of children, but refused application of the "attractive nuisance" doctrine to ordinary water hazards,[29] although they did solidify Mississippi's position relative to the doctrine in other instances. The doctrine was also later refused application where a trespassing child was held to appreciate the danger involved,[30] where a warning was given to stay away,[31] where the condition was not something un-

[17]Beaston v. James Julian, Inc., 49 Del. 521, 120 A.2d 317 (1956); Galleher v. City of Witchita, 179 Kan. 513, 296 P.2d 1062 (1956); Davies v. Land O'Lakes Racing Assoc., 244 Minn. 248, 69 N.W.2d 642 (1955); Banker v. McLaughlin, 146 Tex. 434, 208 S.W.2d 843 (1948).

[18]Van Winkle v. City of King, 149 Cal. App.2d 500, 308 P.2d 512 (1956); Lake v. Ferrer, 139 Cal. App. 2d 114, 293 P.2d 104 (1956); Reardon v. Spring Valley Co., 68 Cal. App. 13 (1924).

[19]Copper v. City of Reading, 392 Pa. 452, 140 A.2d 792 (1958); City Nat'l Bank v. City of Kankakee, 15 Ill. App.2d 458, 146 N.E.2d 381 (1957); Smith v. Evens, 178 Kan. 159 (1955).

[20]See note 12 supra.

[21]Maryland, Alston v. Baltimore Fidelity Whse. Co., 176 Md. 341, 4 A.2d 739 (1939); Massachusetts, Grindley v. McKechnie, 163 Mass. 494, 40 N.E. 764 (1895); New Hampshire, Frost v. Eastern R. R. Co., 64 N.H. 220, 9 Atl. 790 (1886); Ohio, Kucia v. National Tube Co., 230 Ohio App. 453, 155 N.E. 171 (1925); Rhode Island, Davis v. Joslin Mfg. Co., 29 R.I. 101, 69 Atl. 65 (1908); Vermont, Bottum v. Hanks, 84 Vt. 370, 79 Atl. 853 (1913).

[22]See note 9 supra.

[23]United Zinc & Chemical Co. v. Britt, 258 U. S. 268 (1921).

[24]Mackey v. City of Vicksburg, 64 Miss. 777, 2 So. 178 (1887).

[25]Spengler v. Williams, 67 Miss. 1, 6 So. 613 (1889).

[26]Temple v. McComb City, 89 Miss. 1, 42 So. 874 (1907).

[27]Dampf v. Yazoo & M. V. Ry., 95 Miss. 85, 48 So. 612 (1909).

[28]Potera v. City of Brookhaven, 95 Miss. 774, 49 So. 617 (1909).

[29]McComb City v. Hayman, 121 Miss. 525, 87 So. 11 (1920); Thompson v. Ill. Cert. Ry Co., 105 Miss. 636, 63 So. 185 (1913).

[30]Salter v. Deweese Lumber Co., 137 Miss. 229, 102 So. 268 (1924).

[31]Lucas v. Hammond, 150 Miss. 369, 116 So. 536 (1928).

usually attractive to children,[32] where a boy was not acting under childish impulse,[33] and, in the last Mississippi case dealing with water hazards, where there were no extraordinary circumstances connected with drowning.[34] The most recent case involving the doctrine was in 1951, in which the court held it inapplicable because the plaintiff did not go upon the defendant's premises, but was merely attracted to a point near his property line.[35]

It is significant to note that in none of the cases dealing with an exception to the general rule of no liability to trespassers in the absence of wilful or wanton injury does the Mississippi court mention the generally accepted modern view as set forth in section 339 of the *Restatemen of Torts* and adopted by a majority of the jurisdictions, but continues to adhere to the "attractive nuisance" doctrine. Therefore, it is submitted that in a similar situation to that set forth in the instant case, where there is no unusual, concealed, or extraordinary danger, recovery on the basis of the "attractive nuisance" doctrine would be denied in Mississippi.

Edward P. Connell

WORKMEN'S COMPENSATION — HEART ATTACKS — CAUSAL CONNECTION AND THE SUBSTANTIAL EVIDENCE RULE

Suit was brought by the wife of the deceased for death benefits under the Mississippi Workmen's Compensation Act. The proof showed that the deceased had been suffering from pre-existing hypertension, shortness of breath and nervousness for about nine years. The day of his death the deceased was engaged in his normal activities as a supervisor, which consisted of driving to nearby offices and pumping stations. The employee suffered some pain in his lower chest shortly after lunch, and about two o'clock he became sick and helpless. He was taken to two doctors and then to the hospital, but he died shortly after arrival at the hospital. The medical testimony was very contradictory. Two doctors testified that there was a causal connection between the employment and the onset of the heart attack; while two other doctors stated that there was no such causal connection. The attorney-referee, the full Commission, and the Circuit Court all found for the defendants. HELD: Reversed, and judgment awarded to the claimant. There is a presumption of a causal connection between the employment and the injury or death when the onset of a heart attack occurs while the employee is about his work and engaged in the duties of his employment, and the

[32]Bonhomie & H. Ry. v. Hinton, 155 Miss. 173, 124 So. 271 (1929).

[33]Cole v. Miss. P. & L. Co., 100 F.2d 357 (5th Cir. 1938).

[34]Vincent v. Barnhill, 203 Miss. 740, 34 So.2d 363 (1938). "Although we have elected to align ourselves with that group of states which has adopted the attractive nuisance doctrine, we have declared our tendency to limit rather than expand its application." And quoting from Barnhart v. Chicago M. & St. R. R. Co., 89 Wash. 304, 154 P. 441, the court supports the following: "We think the doctrine of attractive nuisance should not be extended to impounded water, unless extraordinary circumstances, such as are not present here, make, by its own peculiar facts, an exception to the generally accepted rule that pools and ponds are not ordinarily to be treated as attractive nuisances."

[35]Shemper v. Cleveland, 212 Miss. 113, 51 So.2d 215 (1951).

fatal consequences arise out of and in the course of the employment. *Russell v. Sohio Southern Pipe Lines, Inc.*, 112 So.2d 357 (Miss. 1959).

Since the enactment of the Mississippi Workmen's Compensation Act,[1] heart attack cases have presented the difficult question of whether or not the injury or death was caused by the employment. It has been recognized by many Mississippi cases that the burden is upon the claimants to prove all facts prerequisite to recovery, one of which is causal connection.[2] A corollary to this rule is that a decision of the Commission on disputed issues of fact will be affirmed, where there is substantial and reasonable evidence to support the Commission's finding of fact.[3] As stated in one case,[4] the test is not whether the claim is supported by substantial evidence, but rather whether or not the finding of the trier of facts, either in allowing or denying the claim, is supported by substantial evidence. There have been cases in which the causal connection between the employment and the injury or death was obvious. This occurs when the accident happened during or immediately after physical strain,[5] as where the employee is found dead after moving boards and digging a ditch,[6] after driving a delivery truck,[7] after lifting and stacking pipes on an oil well,[8] while in his duties as an automobile mechanic,[9] after considerable lifting while gathering tung nuts,[10] immediately after climbing an eleven foot scaffold,[11] where a forest fire spotter walked up 135 steps of a fire tower,[12] while performing manual labor handling lumber,[13] while in his duties as a butcher,[14] after the employee had received a severe burn,[15] and where the employee had scaled three truck loads of logs.[16] On the other hand, our Court has denied an award due

[1]Miss. Code Ann. (1942) §§ 6998-01 et. seq.

[2]Central Electric Power Association v. Hicks, 110 So.2d 351 (Miss. 1959); Insurance Department of Mississippi v. Dinsmore, 104 So.2d 296 (Miss. 1958); Lewis v. Trackside Gasoline Station, 103 So.2d 868 (Miss. 1958); Poole v. Learned & Son. 103 So.2d 396 (Miss. 1958); Rushing v. Water Valley Coca Cola Bottling Co., 232 Miss. 338, 98 So. 2d 870 (1957); Schilling v. Mississippi State Forestry Commission, 226 Miss. 858, 85 So.2d 562 (1956); Thornbrough Well Servicing Co. v. Brown, 223 Miss. 322, 78 So.2d 159 (1955); Ingalls Shipbuilding Corporation v. Howell. 221 Miss. 824, 74 So.2d 863 (1954); Smith v. St. Catherine Gravel Co., 220 Miss. 462, 71 So.2d 221 (1954).

[3]Goodnite v. Farm Equipment Co., 103 So.2d 391 (Miss. 1958); Halbert v. Lamar Advertising Agency, 231 Miss. 437, 95 So.2d 535 (1957); Freeman v. Mississippi Power & Light Co., 230 Miss. 396, 92 So.2d 658 (1957); Lee v. Haltom Lumber Co., 230 Miss. 655, 93 So.2d 641 (1957); Ingalls Shipbuilding Corporation v. Dickerson, 230 Miss. 110, 92 So.2d 354 (1957); Mississippi Products v. Gordy, 224 Miss. 690, 80 So.2d 793 (1955); Dillion v. Gasoline Plant Construction Corp., 222 Miss. 10, 75 So.2d 80 (1954).

[4]Freeman v. Mississippi Power & Light Co., 230 Miss. 396, 92 So.2d 658 (1957).

[5]La Dew v. La Borde, 216 Miss. 598, 63 So.2d 56 (1953).

[6]Sunnyland Contracting Co. v. Davis, 221 Miss. 744, 74 So.2d 858 (1954).

[7]Railway Express Agency v. Hollingsworth, 221 Miss. 688, 74 So.2d 754 (1954).

[8]Thornbrough Well Servicing Co. v. Brown, 223 Miss. 322, 78 So.2d 159 (1955).

[9]Mississippi Products v. Gordy, 224 Miss. 690, 80 So.2d 793 (1955).

[10]Pearl River Tung Co. v. Estate of John, 225 Miss. 303, 83 So. 2d 95 (1955).

[11]Southern Engineering & Electric Co. v. Chester, 226 Miss. 136, 83 So.2d 811 (1955).

[12]Schilling v. Mississippi State Forestry Commission, 226 Miss. 858, 85 So.2d 562 (1956).

[13]Lee v. Haltom Lumber Co., 230 Miss. 655, 93 So.2d 641 (1957).

[14]Pennington v. Smith, 232 Miss. 775, 100 So.2d 569 (1958).

[15]Harper Foundry and Machine Co. v. Harper, 232 Miss. 873, 100 So.2d 779 (1958).

[16]Poole v. Learned & Son, 103 So.2d 396 (Miss. 1958).

to lack of proof of causal connection in the following instances: while the employee had a heart attack after eating an evening meal and during no period of overexertion,[17] eight months after suffering an injury on the job,[18] while at work using an oxyacetylene torch to apply heat to the bulkhead of a ship under construction,[19] four hours after quitting work as a painter on a construction job,[20] where the line foreman of a power company had only been supervising from the ground,[21] after returning to work on a semi-active basis following a previous attack,[22] and while a route man for a beverage distributor was moving cases of bottle crowns.[23]

The questions of causal connection and substantial evidence were recently considered in two decisions, the *Hicks* case[24] and the *Shivers* case.[25] In both cases the Supreme Court awarded compensation, after it had been denied by both the attorney-referee and the full Commission. In the *Hicks* case the general rule was stated to be that the decision of the Commission should be affirmed where there is substantial evidence to support its findings of fact, but said that questions of fundamental importance are always open to judicial review. The vigorous dissent[26] in the *Hicks* case said that the Court had for "all practical purposes abolished the substantial evidence rule in compensation cases, at least in cases involving heart attacks." The dissent went on to say that the question was whether there was a causal connection between the employment and the attack, and that even though this state is committed to the rule that the exertion does not have to be unusual, this does not mean that causal connection may be taken for granted. Professor Larson[27] also takes this view, and says that there must still be an exertion medically capable of causing the collapse, which by no means can be taken for granted.

In conclusion, it is submitted that the Court in the principal case by raising a presumption of causal connection abolished one of the necessary elements of proof, as required by numerous Mississippi cases. The decision also leaves doubt as to whether the substantial evidence rule still exists. It appears that the better view is expressed in the dissent of the *Hicks* case; that is, to require proof of a causal connection between the employment and the injury, and follow the substantial evidence rule, when it appears that the Commission's finding is based upon sufficient reasonable evidence.

Pat H. Scanlon

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[17]Fischer v. Gloster Lumber & Builders Supply Co., 57 So.2d 871 (Miss. 1952).
[18]Smith v. St. Catherine Gravel Co., 220 Miss. 462, 71 So.2d 221 (1954).
[19]Ingalls Shipbuilding Corporation v. Howell, 221 Miss. 824, 74 So.2d 863 (1954).
[20]Dillion v. Gasoline Plant Construction Corp., 222 Miss. 10, 75 So.2d 80 (1954).
[21]Freeman v. Mississippi Power & Light Co., 230 Miss. 396, 92 So.2d 658 (1957).
[22]Halbert v. Lamar Advertising Agency, 231 Miss. 437, 95 So.2d 535 (1957).
[23]Rushing v. Water Valley Coca Cola Bottling Co., 232 Miss. 338, 98 So.2d 870 (1957).
[24]Central Electric Power Association v. Hicks, 110 So.2d 351 (Miss. 1959).
[25]Shivers v. Biloxi-Gulfport Daily Herald, 110 So.2d 359 (Miss. 1959).
[26]Central Electric Power Association v. Hicks, 110 So.2d 351 (Miss. 1959); Gillespie, J., McGehee, C. J. and Roberds, J., dissenting at page 358.
[27]Larson, Workmen's Compensation § 38.83 (1952).

RECENT BOOKS

THE SUPREME COURT FROM TAFT TO WARREN
By Alpheus T. Mason. Baton Rouge: Louisiana State University Press, 1958. $4.95.

This is a disappointing book—disappointing because on the record of past achievements one would expect much more from Professor Mason. In his own words he hopes to "dispel superstition and promote understanding of the judicial function in American politics" by portraying what "actually" occurred in the Supreme Court during the four decades since Chief Justice Taft assumed the role of Chief Justice in 1921.[1] He urges that "No good purpose can be served by trying to perpetuate the fiction that judges operate in a nonpolitical vacuum, above any personal considerations, and beyond political influences."[2] Thus, in one sentence one finds the "superstition" and by implication the author's version of the "judicial function." This book is the outgrowth of lectures given in the spring of 1957 at Louisiana State University. Professor Mason, a well known political scientist teaching at Princeton University, is the author of numerous books and articles. One of his most recent books is the well-received biography of the late Chief Justice Stone. The author is no novice in the arena of constitutional law and history.

In his opening chapter entitled "The Cult of The Robe" the author expounds upon his thesis that a "fiction" is prevalent in our society that judges make no law—even close to a conspiracy by most responsible people to maintain that fiction. This "theory that judges are helpless tools of constitutional imperatives"[3] he finds given "official gloss" by Chief Justice Marshall in *Marbury v. Madison,* in which the author suggests that Marshall "set forth the notion that the judicial process is essentially an exercise in mechanics. Supreme Court Justices discover law; they do not make it."[4] In a rather sarcastic passage Mr. Mason manages to paraphrase Marshall's view in a not very fair manner.[5]

In any case, the author rightfully reminds us that "The language of the Constitution itself is ambiguous . . . . It is on the rocks of the Constitution's ambiguity, permitting, *even compelling the translation of judidcial preferences into law,* that the mechanical theory breaks down."[6] The emphasis in this passage is mine. Precisely what is Professor Mason suggesting as the appropriate function of the judiciary? Another representative statement in this chapter is: "The debates on the nomination of Brandeis and of Hughes indicate increasing consciousness that what 'the law' is turns *primarily* on the Court's personnel."[7] Again, the emphasis is mine. What exactly does Mr. Mason mean when he suggests that,

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1P. ix.
2P. viii.
3P. 32.
4P. 12.
5P. 13.
6P. 15.
7P. 35.

> "In the transformed context of 1957 certain members of the Supreme Court recognize, as did Justice Holmes two generations ago, that the profession of judicial helplessness is not only a self-delusion, but perhaps also a grievous failure to discharge a *judicial responsibility*. Among the more significant aspects of the Warren Court decisions, especially in the civil rights orbit, is *the unblushing way in which certain Justices take sides* on burning issues . . . . *The judge inevitably takes sides and his predilection may well be the decisive factor.* Nevertheless, the miraculous mechanical theory of the judicial process still has its defenders."[8]

The author, although he never spells it out, seems to be suggesting that the function of a Supreme Court justice in exercising judicial review is to equate his individual concept of the wisdom of governmental action with its constitutionality. Or, although the "judges inevitably take sides," perhaps Professor Mason is saved from so extreme—and I submit, erroneous—a view by those marvelous weasel-words "may well be" when he suggests that the judge's "predilections may well be the decisive factor." On this chapter alone one is never quite sure whether the author is simply critical of the Taft and Hughes courts for equating wisdom with constitutionality or whether he is suggesting that this is the nub of the judicial function and that those courts were attuned to the wrong brand of wisdom. The book jacket makes a great point of noting that "the Judiciary's failure to observe the fine line between judicial *review* and judicial *supremacy* has made it the storm center." Nevertheless, one proceeds to the succeeding chapters with the disquieting feeling that Professor Mason is over simplifying and distorting the judicial process just as much as those who insist that judges make no law.

In successive chapters the author reviews the history of the court by the terms of Chief Justices Taft ("The Court as Super-Legislature"), Hughes ("The Court in Retreat") and Stone ("The Court in Search of its Role"). He recounts the events of those days in a lively, interesting, and at times even illuminating fashion. In a not very sympathetic chapter the author very briefly traces the career of Taft, seeking perhaps to reveal some "key" to Taft's record on the Supreme Court. He then reviews the cases decided during Taft's term concerning the scope of Congressional power under the commerce clause and the validity of social and economic legislation under the due process clauses of the 5th and 14th Amendments. The discussion of the Hughes Court centers on the key cases of that era and the "court-packing" plan of President Roosevelt. The author is extremely harsh on Hughes—not entirely in the fashion of a Rodell, but then not too far removed either. One gets the impression that, like Rodell, Professor Mason proceeds upon such crass propositions as once a railroad lawyer, always a railroad lawyer. The constant theme of the chapter is that Hughes valued judicial stability above all else and that reversal of decisions should be avoided *at any cost* in order to maintain the theory that judges do not make law.

In the chapter on the Stone Court and the two final chapters ("Toward Positive Responsibility" and "By the Light of Reason") the

[8]Pp. 36-37, emphasis supplied.

author discusses trends in the court's work as he sees them and recurs to his thesis stated in Chapter 1. A major portion of the discussion is given over to a stimulating discussion of the "preferred rights" doctrine and its possible bases, along with Stone's responsibility in the evolution of that doctrine. The author traces Stone's career and seeks to show that the major theme in Stone's constitutional jurisprudence was judicial self-restraint.[9] Obviously, Chief Justice Stone is one of Professor Mason's "heroes." Thus, he attempts to show Stone's differences from —all superior apparently—as well as similarities to Holmes and Brandeis. For example, he can say that, "In dissent Holmes, addicted to generalization and gifted as an essayist, tended to avoid the tough issues and failed to meet the majority on its own ground."[10] Of Brandeis the author suggests that he "did not hesitate to utilize the Court as a forum to persuade others of [legislation's] wisdom,"[11] and that, "Stone took specific exception to Brandeis' judicial activism."[12] As the author discusses the history of the court under Stone and since, he seems to reserve a judgment for Frankfurter almost as harsh as that for Hughes. This is especially evident as the author discusses Frankfurter's opposition to the doctrine of "preferred rights" and Frankfurter's championing of his own particular version of judicial restraint. In the final two chapters Professor Mason more clearly states his version of the judicial function of the Supreme Court of the United States. I think this is especially clear in his discussion of the segregation cases of 1954.[13] The author asserts:

> "With this decision certain of the most sacred temples in the realm of judicial witchcraft crumbled. Exorcism was out of style. Even the observance of *stare decisis* was rudely shaken; the notion that social facts are meat for the legislature but not for the Court, was ignored; the distinction between *judgment* and *will,* already tenuous, was honored only in the breach."[14]

One may well ask, just what does Professor Mason wish to say here? Is it that judges decide cases—and in particular the *Brown* case—according to their own private or individual predilections? If that is not precisely his meaning, consider this statement only three paragraphs later, made after referring to the public clamor concerning the case: "The segregation cases reaffirm the fact that judges do make and unmake law."[15] The segregation cases—of which the author approves—can do without this sort of defense. Those cases may be defended and have been convincingly defended in many instances,[16] but not on Professor Mason's ground.

Professor Mason has slain his dragon. The myth that judges make no law should no longer roam the land. But Professor Mason seems to

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[9]E.g., p. 122.
[10]P. 131.
[11]Ibid.
[12]P. 132.
[13]Brown v. Board of Educ., 347 U.S. 483 (1954).
[14]P. 190.
[15]P. 191.
[16]For one of many examples, see Kauper, *Frontiers of Constitutional Liberty* 216-225 (1956).

have replaced his dragon with another—one which both he and many critics of *Brown v. Board of Education* "believe in," but with varying degrees of equanimity. For one myth the author has substituted another. He would apparently have us believe the myth that the function of a Supreme Court Justice in exercising judicial review is to equate his concept of a law's wisdom with its constitutionality. This is no less a myth—and equally dangerous. I fear that Professor Mason has been flaying a dead horse. As Professor Paul Freund said in beginning his stimulating and profound lectures *On Understanding the Supreme Court,*

> "Is the law of the Supreme Court a reflection of the notions of 'policy' held by its members? The question recalls the controversy over whether judges 'make or find' the law. A generation or two ago it was thought rather daring to insist that judges make law. Old Jeremiah Smith, who began the teaching of law at Harvard after a career on the New Hampshire Supreme Court, properly deflated the issue. 'Do judges make law?' he repeated. 'Course they do. Made some myself.' Of course Supreme Court Justices decide cases on the basis of their ideas of policy.
>
> *But to say this, as to say that judges make law, is not the end but only the beginning of sophistication."*[17]

Unfortunately, Professor Mason (like many of the critics of *Brown v. Board of Education*) has stopped at the beginning. The publishers in a blurb accompanying the book which this reviewer received suggested that "Mr. Mason gives the shrewdest analysis to date of the forces that have shaped the Supreme Court and which still influence its decision." They could not be more wrong! There are a number of other books in which one may find understanding of the judicial process. To mention only some of the most recent there are two sets of lectures which, like Professor Mason's, also focus on the Supreme Court: the above-mentioned lectures by Professor Freund and the Cooley lectures by Professor Kauper.[18] But *The Supreme Court from Taft to Warren* is not such a book.

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[17]Freund, *On Understanding the Supreme Court* (1949) p. 3, emphasis supplied. And see Kauper, supra note 16, pp. 12-13.

[18]Supra note 16. See especially Chapter 1.

COST JUSTIFICATION

By Herbert F. Taggart. Ann Arbor, Michigan: Bureau of Business Research, School of Business Administration, The University of Michigan, 1959. Pp. 588. $12.50.

This volume, entitled "Cost Justification," is a masterful and searching analysis and discussion of all of the reported cases before the Federal Trade Commission and the courts wherein the so-called "cost justification defense" has been raised in Complaints under Section 1 of the Robinson-Patman Act, amending Section 2 of the Clayton Act.[2] The book therefore concerns that narrow and expensive, if not illusory, defense permitted under the act which holds non-actionable price discriminations occurring in interstate commerce between different purchasers of commodities of like grade and quality, if the facts support this defense:

> "PROVIDED, that nothing contained in sections 12, 13, 14-21, and 22-27 of this shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

The work, obviously, will possess its greatest utility to practitioners in the segmented area of anti-trust law, and even there its value is further restricted to those clients who have such large interests at stake that they can afford the expense, and whose accounting records are adapted to the use of this defense.

Despite its limited utility insofar as the entire bar is concerned, certainly this feature detracts none in the least from the high quality of this contribution to legal and accounting literature. It constitutes a work of consummate skill in the laying bare of involved accounting problems and theories inherent in the assertion of the "cost justification defense" in all of the adjudicated proceedings before the Commission and the courts where the defense was urged. Prolonged and detailed research, extensive analyses, and critical evaluations are evident from the detailed documentation of the textual material.

The author brings to bear on his subject a reputation and renown of special competence in this field. The eminence of Professor Taggart, for the task before him in the compilation of this treatise, as one of the most outstanding accountants in this country and as one well versed in this specialized field, is attested to by virtue of the fact that he was appointed as Chairman of the "Advisory Committee on Cost Justification Report to the Federal Trade Commission." His peerless scholarship, penetrating insight, and profound knowledge of the subject has been availed of by many bar associations throughout the country in various anti-trust seminars.

Professor Taggart undertook the preparation of this volume in the face of observations such as the remark by a former Chairman of the

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[1] 15 U.S.C. § 13 (1952).
[2] 38 Stat. 730 (1914).

Commission, Honorable E. F. Howrey, "that the cost defense has proved largely illusory," and the conclusion of the Report of the Attorney General's National Committee to Study the Anti-trust Laws, that such defense is "largely illusory in practice." Out of the twenty-one respondents who have pleaded cost defense in Commission proceeding since 1914 and two defendants in treble damage suits, all of which cases are analyzed in detail and provide the textual material in this work, very few of these parties were successful. From these cases, however—being "all the recorded instances in which respondents to Federal Trade Commission complaints or defendants in treble damage suits have attempted to defend their pricing practices"—to use the words of the author, "anyone who has similar problems" may "draw inspiration or warning."

In short, it may be fairly said that the anti-trust practitioner lucky enough to have a client who is able to finance these cost studies and whose accounting and sales records are adaptable to the assertion and maintenance of the "cost justification" defense will find Professor Taggart's book an indispensable tool or "must" in his defense library.

Earl T. Thomas
Member
Wells, Thomas & Wells
Jackson, Mississippi

BOOKS RECEIVED

CONTINUING LEGAL EDUCATION FOR PROFESSIONAL COMPETENCE AND RESPONSIBILITY. Edited by the Joint Committee on Continuing Legal Education of the American Bar Institute and the American Bar Association. Philadelphia, Pa.: American Law Institute. 1959. Pp. 315. $3.00.

EQUAL JUSTICE FOR THE ACCUSED. By the New York Bar Association. Garden City, N. Y.: Doubleday & Co., Inc. 1959. Pp. 144. $3. 50.

KEYSTONE COUNSELOR. By Isaac J. Vanartsdalen. New York, N.Y.: Exposition Press, Inc. 1959. Pp. 279. $4.50.

NAMING DAY IN EDEN. By Noah Jonathan Jacobs. New York, N.Y.: The McMillan Co. 1958. Pp. 159. $3.95.

PROFIT SHARING IN BUSINESS AND ESTATE PLANNING. By George Byron Gordon. New York, N.Y.: Farnsworth Publishing Co., Inc. 1959. Pp. 64. $2.00.

SOURCES OF OUR LIBERTIES. Edited by Richard L. Perry and John C. Cooper. New York, N.Y.: American Bar Foundation. 1952. Pp. 440. $5.00.

STARE DECISIS. By Russell F. Moore. New York, N. Y.: Simmons-Boardman Books. 1958. Pp. 45. $3.00.

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